No. 13284

United States
Court of Appeals
For the Ninth Circuit.

MUTUAL TELEPHONE COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

For the Plaintiff, Mutual Telephone Company:

HEATON L. WRENN, ESQ.,
MARSHALL M. GOODSILL, ESQ.,

Bank of Hawaii Building,
Honolulu, T. H.

For the Defendant, United States of America:

HOWARD K. HODDICK, ESQ.,
Acting United States Attorney,

District of Hawaii,
Federal Building,
Honolulu, T. H.

In the United States District Court
for the District of Hawaii

Civil No. 931

MUTUAL TELEPHONE COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Mutual Telephone Company, a corporation organized under the laws of the Kingdom of Hawaii and existing under and by virtue of the laws of the Territory of Hawaii with its principal place of business in the City of Honolulu, said Territory, brings this suit against the United States of America, and complains and alleges:

I.

The grounds upon which the jurisdiction of this court depends are:

(1) This is a civil action by a Hawaiian corporation against the United States of America arising under the law providing for internal revenue, of which this court has jurisdiction, regardless of the sum involved, under Title 28, United States Code, Sections 1331, 1340 and 1346, as hereinafter more fully appears.

(2) Plaintiff has complied with the requirements of Section 3772(a)(1) and (2) of the Internal Revenue Code, regarding suits for recovery of any internal revenue tax, [3*] penalty or other sum, as hereinafter more fully appears.

II.

Plaintiff filed in due time its income tax, declared value excess profits tax, and excess profits tax returns for the calendar years 1941 and 1942 with the Collector of Internal Revenue of the United States for the District of Hawaii. The Report of Examination by the Internal Revenue Agent in Charge, dated November 2, 1943, proposed deficiency assessments of taxes for those years on the grounds of failure to include as gross income certain installation and supersedure charges hereinafter described. A protest of the proposed deficiency assessments on these grounds was filed with the Agent in Charge under date of July 28, 1944. The protest was denied by the Commissioner of Internal Revenue and a notice of determination of deficiency, dated January 8, 1945, was received by plaintiff. The taxes in question were assessed and paid with interest thereon on February 2, 1945, to Fred H. Kanne, the then Collector of Internal Revenue of the United States for the District of Hawaii. Said Fred H. Kanne is now dead and is not in office as said Collector of Internal Revenue. Plaintiff filed duly executed claims for refund on December 6, 1946, for each of the calendar years 1941 and 1942 with the Collector of Internal Revenue of the

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

United States for the District of Hawaii. The Report of Examination of the Internal Revenue Agent in Charge, dated October 16, [4] 1947, in connection with such claims for refund proposed that the claims be disallowed. On June 1, 1948, plaintiff received a notice of disallowance in full of both of such claims for refund from the Commissioner of Internal Revenue, such notice being dated May 19, 1948.

III.

Plaintiff experienced a rapid rate of increase in the number of phones connected in the year 1941, due to increased construction resulting from defense activities and considered the increase in the plant investment resulting therefrom dangerous. The increased demand for service appeared to plaintiff to be temporary in nature and the expanded investment remaining on plaintiff's accounts after the demand for service diminished would require unduly large overhead charges at the later date, in proportion to income. Plaintiff proposed to increase charges for installation and supersedure in the hope that this would have a retarding effect on prospective installers.

IV.

Plaintiff's rates and charges must be fixed by Order of the Public Utilities Commission of the Territory of Hawaii. Such Commission considered plaintiff's proposal to increase installation and supersedure charges in its Decision No. 51, filed October 24, 1941, and expressed satisfaction with

the increased charges, provided they were not treated as income. The decision stated: [5]

> "The Company makes no showing that such an increase in revenue is required and we believe it improper to allow the increase to go through in a manner that would permit the increase to be passed on to the common stockholders in the form of increased dividends.
>
> * * *
>
> "The increase over present charges would be credited to Account No. 175, Contributions to Telephone Plant, and in computing rates on an 'investment basis' would be a reduction from the net investment in arriving at a rate base. Investors would not require a return and subscribers would be spared paying a capital charge on same. On motion of the Commission, or upon application of the Company, other disposition of the accrued balance might be made as conditions warranted."

Commission Order No. 379, dated October 1, 1941, entered pursuant to the above decision, directed the Company to make the increased charges and required accounting therefor as follows:

> "The amounts representing the increase in connection charges and charges for supersedure of service, over and above those which are now being charged by petitioner in the same respective categories, and the newly established charges for supersedure of service where no charge has been previously made, shall be charged to Account No. 175, Contributions to

Telephone Plant, the amounts so accruing to be segregated from other charges to said account."

V.

The additional charges described in Order No. 379 were put into effect by plaintiff as of October 2, 1941, and were continued in force until May 1, 1942, when they were terminated pursuant to Commission's Order No. 406, dated July 16, 1942, which provided for the accounting for the funds collected as follows:

"It is further ordered that the amount of moneys collected by Petitioner through the increased installation and supersedure charges, as authorized by Commissioner's Order [6] No. 379, shall be retained in Subaccount No. 175.2 'Contributions to Telephone Plant' and shall not be taken into the income account until such time as the Commission may authorize such action."

VI.

When the increased installation and supersedure charges were collected from a subscriber a portion thereof, representing the previously existing customary charge for such service, was placed in the income account and the balance was placed in a capital account entitled "Liability for Installation Charges." This account is the same account as Account 175 and Subaccount 175.2, "Contributions to Telephone Plant," specified in Commission's Orders Nos. 379 and 406. This capital account remained in existence, and the excess charges remained therein from 1941 through 1948, inclusive.

VII.

During 1948, the Public Utilities Commission made an investigation and held a hearing on Plaintiff's rates and charges. In its Decision No. 102, filed August 12, 1948, the Commission considered the cost of Plaintiff's pension plan, in particular Plaintiff's accrued liability, for pensions based on past services, and decided that the amount held in the account entitled "Contributions of Telephone Plant" should be transferred to the pension reserve to reduce the past service obligation. Commission Order No. 598, dated August 7, 1948, provided:

> "(4) That applicant transfer the amount of $41,970.50, presently carried in Account 175.2 'Contributions of Telephone Plant,' to its pension reserve [7] to reduce the accrued liability for past service."

This portion of the Order was suspended until final determination of the amount transferable, pursuant to the Commission's authorization, and the actual transfer to the pension reserve was made by plaintiff as of March 1, 1949.

VIII.

Plaintiff maintains its records on the accrual basis, filing its tax returns on that same basis for the calendar year. Plaintiff received money in the sum of $13,341.50 in the year 1941, and $28,673.00 in the year 1942, in excess charges as authorized by Order No. 379 of the Commission. Plaintiff fully complied with such Order and did not take

up these excess charges into its income account but credited them to a capital account. These charges under Commission Orders Nos. 379 and 406 could not be taken into plaintiff's income account. Plaintiff did not report these charges as part of its gross income in its tax returns for the years 1941 and 1942.

IX.

Plaintiff's accounting method clearly and correctly reflects its income for the years 1941 and 1942.

X.

The sums received as such increased installation and supersedure charges are not includable in plaintiff's gross income for the years 1941 and 1942, or for any other year, under Sections 22(a), 41 and 42 of the Internal Revenue Code. The sums received were receipts of capital, not income. [8]

XI.

Even if the sums received as such increased installation and supersedure charges were in the nature of income they are not includable in plaintiff's gross income for the years 1941 and 1942, under Sections 22(a), 41 and 42 of the Internal Revenue Code, because they were received subject to specific limitations and conditions which deprived plaintiff of unfettered control over their disposition.

XII.

The Commissioner of Internal Revenue acted erroneously and illegally and without authority in

including the above-mentioned sums in computing plaintiff's gross income for the years 1941 and 1942, and in determining that plaintiff's method of accounting did not clearly reflect its income, which resulted in the erroneous and illegal assessment and collection of additional taxes for the years 1941 and 1942, amounting to a total of $34,055.38 in excess of the correct amounts due for such years, together with interest charges thereon of $4,378.85.

XIII.

Defendant, through its Collector aforesaid, erroneously and illegally and without authority of law over-assessed and collected the sum of about $34,055.38 for the years 1941 and 1942, with interest thereon amounting to $4,378.85; this being in addition to all other income, declared value excess profits tax and excess profits tax for the years involved.

XIV.

No amount has been paid to Plaintiff on account of said [9] sum of $34,055.38 and interest charges thereon of $4,378.85 erroneously and illegally assessed and collected by defendant from plaintiff.

XV.

Plaintiff is justly entitled to recover from defendant the said sum of $34,055.38, plus interest thereon amounting to $4,378.85, plus interest on the total amount as provided by law. Plaintiff has observed and performed the provisions and requirements of the laws of the United States and the rules and regulations prescribed by the Commis-

sioner of Internal Revenue and approved by the Secretary of the Treasury of the United States, and all other matters and things necessary to be observed and performed on its part to entitle it to recovery of said sums.

Wherefore, plaintiff prays judgment against defendant, upon the facts and law, in the sum of $38,434.23, together with interest as in such cases is provided by law and the costs of this suit, and that process issue out of this court requiring defendant to appear and answer this complaint.

Dated at Honolulu, T. H., this 19th day of August, 1949.

/s/ HEATON L. WRENN,
/s/ MARSHALL M. GOODSILL,
Attorneys for Plaintiff.

Of Counsel:

ANDERSON, WRENN & JENKS.

Duly verified.

[Endorsed]: Filed August 19, 1949. [10]

[Title of District Court and Cause.]

SECOND AMENDMENT OF COMPLAINT

Now comes plaintiff herein, Mutual Telephone Company, by its attorneys, and, in accordance with Rule 15(a) of the Federal Rules of Civil Procedure, does hereby amend its Complaint filed herein on August 19, 1949, as amended by Amendment, dated

January 28, 1951, by striking out Paragraphs X through XV, inclusive, and the "Wherefore" paragraph of the Complaint as so amended and inserting in lieu thereof the following:

X.

The sums received by plaintiff as such increased installation and supersedure charges are not includable in plaintiff's gross income for the years 1941 and 1942, or in any other year because they do not constitute "income" within the meaning of the Sixteenth Amendment. [13]

XI.

Even if the sums received by plaintiff as such increased installation and supersedure charges become "income" in a subsequent year, such sums are not includable in plaintiff's gross income for the years 1941 and 1942, because they were received and held as capital accretions at that time.

XII.

Even if the sums received by plaintiff as such increased installation and supersedure charges must be considered as receipts of income rather than as receipts of capital, such sums are not includable in plaintiff's gross income for the years 1941 and 1942, because they were received and held subject to specific restrictions and conditions which deprived plaintiff of unfettered control over their disposition.

XIII.

The Commissioner of Internal Revenue acted er-

roneously and illegally and without authority in including the above-mentioned sums in computing plaintiff's gross income for the years 1941 and 1942, and in determining that plaintiff's method of accounting did not clearly reflect its income, which resulted in the erroneous and illegal assessment and collection of additional taxes for the years 1941 and 1942, amounting to a total of $32,522.51 in excess of the correct amounts due for such years, together with interest charges thereon of $4,205.88, [14] or a total of $36,728.39.

XIV.

Defendant, through its Collector aforesaid, erroneously and illegally and without authority of law over-assessed and collected the said sum of $32,522.51 for the years 1941 and 1942, with interest thereon amounting to $4,205.88; this being in addition to all other income, declared value excess profits tax and excess profits tax for the years involved.

XV.

No amount has been paid to plaintiff on account of said total amount of $36,728.39 erroneously and illegally assessed and collected by defendant from plaintiff.

XVI.

Plaintiff is justly entitled to recover from defendant the said sum of $36,728.39, plus interest thereon as provided by law. Plaintiff has observed and performed the provisions and requirements of the laws of the United States and the rules and regulations prescribed by the Commissioner of Internal Revenue and approved by the Secretary of

the Treasury of the United States, and all other matters and things necessary to be observed and performed on its part to entitle it to recovery of said sums.

Wherefore, plaintiff prays judgment against [15] defendant upon the facts and law, in the sum of $36,728.39, together with interest as in such cases is provided by law and the costs of this suit, and that process issue out of this court requiring defendant to appear and answer this complaint.

Dated at Honolulu, T. H., this 8th day of March, 1951.

/s/ HEATON L. WRENN,
/s/ MARSHALL M. GOODSILL,
Attorneys for Plaintiff. [16]

Defendant herein by its attorney consents to the filing of the foregoing Amendment to the Complaint of plaintiff, filed August 19, 1949, as amended by Amendment, dated January 28, 1951.

/s/ HOWARD K. HODDICK,
Acting United States Attorney, District of Hawaii,
Attorney for Defendant.

Leave to file the foregoing Amendment to the Complaint of plaintiff, filed August 19, 1949, as amended by Amendment, dated January 28, 1951, is hereby granted.

/s/ J. FRANK McLAUGHLIN,
Judge of the United States District Court for the District of Hawaii.

[Endorsed]: March 9, 1951. [17]

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America, Defendant above named, by Howard K. Hoddick, Acting United States Attorney for the District of Hawaii, and for an answer to the Complaint, filed herein on August 19, 1949, as amended by Amendment, filed January 31, 1951, and as further amended by Second Amendment, filed March 9, 1951, alleges as follows:

I.

The allegations contained in Paragraph I of the Complaint are admitted.

II.

The allegations contained in Paragraph II of the Complaint are admitted.

III.

The Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph III of the Complaint.

IV.

The allegations contained in Paragraph IV of the Complaint are denied, except it is admitted that the Public Utilities Commission of the Territory of Hawaii entered Decision No. 51 on [19] October 24, 1941, and entered Commission Order No. 379 under date of October 1, 1941, and that the Com-

mission's Decision No. 51 and Order No. 379 are in part as set forth in Paragraph IV of the Complaint.

V.

The allegations contained in Paragraph V of the Complaint are admitted.

VI.

The allegations contained in Paragraph VI of the Complaint are denied, except it is admitted that the increased installation and supersedure charges collected from the subscribers pursuant to the Commission's Decision No. 51 and Order No. 379 were entered in an account entitled "Liability for Installation Charges."

VII.

The allegations contained in Paragraph VII of the Complaint are admitted.

VIII.

The allegations contained in Paragraph VIII of the Complaint are denied, except it is admitted that Plaintiff maintains its records on the accrual basis, filing its tax returns on that same basis for the calendar year; that Plaintiff received money in the sum of $13,341.50 in the year 1941, and $28,673.00 in the year 1942, in charges as authorized by Order No. 379 of the Commission; and that Plaintiff did not report these charges as part of its gross income in its tax returns for the years 1941 and 1942.

IX.

The allegations contained in Paragraph IX of the Complaint are denied.

X.

The allegations contained in Paragraph X of the Complaint, as amended, are denied. [20]

XI.

The allegations contained in Paragraph XI of the Complaint, as amended, are denied.

XII.

The allegations contained in Paragraph XII of the Complaint, as amended, are denied.

XIII.

The allegations contained in Paragraph XIII of the Complaint, as amended, are denied.

XIV.

The allegations contained in Paragraph XIV of the Complaint, as amended, are denied.

XV.

The allegations contained in Paragraph XV of the Complaint, as amended, are denied, except it is admitted that no amount has been paid to the Plaintiff on account of said sum of $32,522.51 and interest charges thereon of $4,205.88.

XVI.

The allegations contained in Paragraph XVI of the Complaint, as amended, are denied.

Wherefore, Defendant prays for the dismissal of the Complaint filed herein and for its costs and disbursements in this action.

Dated Honolulu, T. H., this 16th day of March, 1951.

/s/ HOWARD K. HODDICK,

Acting United States Attorney, District of Hawaii, Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 16, 1951. [21]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys that the following statements of fact shall be considered as true and in evidence. It is also agreed by and between the parties hereto that they may also offer any other evidence, oral, documentary or otherwise, in the trial of this case, provided such additional evidence shall not vary or in any way contradict or conflict with the facts herein stipulated to be taken as true, and provided, further, that such additional evidence is properly admissible.

I.

Plaintiff, Mutual Telephone Company, is a corporation organized under the laws of the Kingdom of Hawaii and existing under the laws of the Territory of Hawaii. Plaintiff is a public utility whose principal business consists of furnishing wire telephone service in the Hawaiian Islands. Plaintiff is and has been at all times material to this case a public utility subject to the jurisdiction of the Public Utilities Commission [23] of the Territory of Hawaii under Chapter 82, Revised Laws of Hawaii, 1945, as amended, and its rates, fares, charges, classifications, rules, and practices, and its form and method of keeping accounts, books and records, and its accounting system and its financial transactions are subject to the regulation of the Public Utilities Commission.

II.

On September 10, 1941, plaintiff filed a petition with the Public Utilities Commission of the Territory of Hawaii, which was assigned Docket No. 764, in which plaintiff requested the said Public Utilities Commission to authorize certain increases in its installation tariffs and to authorize establishment of new supersedure tariffs for the purpose of diminishing the demand for new telephone service in the City of Honolulu. A true copy of that petition is attached hereto and made a part hereof and designated as Exhibit "A." Installation charges (also known as connection charges) are of two types—service connection charges and recon-

nection charges. A service connection charge is a charge customarily made by plaintiff for connecting each telephone instrument newly placed in a subscriber's premises. A reconnection charge is a charge customarily made by plaintiff for reconnecting a dead instrument already in place in a subscriber's premises. A supersedure charge is a charge not theretofore made by plaintiff for substituting a new subscriber for a prior subscriber at the same premises where the telephone instrument is not dead and is not reconnected.

III.

After a hearing on the above petition the Public Utilities Commission issued its Decision No. 51 and its Order No. 379 [24] which were filed October 24, 1941. In Decision No. 51 the Public Utilities Commission approved the request of the plaintiff and in its Order No. 379 it made the requested increases in the installation and supersedure tariffs. In Decision No. 51 the Public Utilities Commission found that while plaintiff did not contend that the additional income was required, it did contend that the additional charges were required for the retarding effect; that plaintiff had made no showing that an increase in revenue was required and that the Commission believed that it was improper to allow the increase to go through in a manner which would permit it to be passed on to the common stockholders in the form of increased dividends; that the increase would be credited to Account No. 175, Contributions to Telephone Plant, and in computing rates would be a reduction from the net

investment in arriving at a rate base and that investors would not require a return and subscribers would be spared paying a capital charge on the same; that on motion of the Commission or other application of plaintiff other disposition of the accrued balance might be made as conditions warranted; and that in the opinion of the Commission the increased charges should be but temporary. In Order No. 379 the Commission directed that the increased installation and the new supersedure charges should be charged to Account No. 175, Contributions to Telephone Plant, and the amounts so accruing should be segregated from the other charges in said account. A true copy of Decision No. 51 and Order No. 379 is attached hereto, made a part hereof and designated as Exhibit "B."

IV.

The increased installation and new supersedure charges provided for in Decision No. 51 and Order No. 379 were put into [25] effect by the plaintiff as of October 2, 1941. On April 22, 1942, the plaintiff filed with the Public Utilities Commission a petition in which it requested a termination of the additional charges. The U. S. Army Signal Corps had established a system of priorities for telephone allocations and consequently the plaintiff considered the additional charges no longer necessary. A true copy of the plaintiff's petition of April 22, 1942, is attached hereto, made a part hereof and designated as Exhibit "C."

V.

Pursuant to the filing of the aforesaid petition the Public Utilities Commission by Decision No. 57 and Order No. 406, filed on July 18, 1942, terminated the increased and newly established charges as of May 1, 1942. In its decision and order the Public Utilities Commission directed that the additional charges collected by the plaintiff pursuant to Decision No. 51 and Order No. 379 were to be held in Account No. 175 until the Public Utilities Commission should determine their final disposition. A true copy of Decision No. 57 and Order No. 406 is attached hereto, made a part hereof and designated as Exhibit "D."

VI.

For many years plaintiff has kept its accounts in accordance with the Uniform System of Accounts for Class A Telephone Companies issued by the Federal Communications Commission, which system was prescribed for plaintiff by Order No. 284 of the Public Utilities Commission, dated December 9, 1937, effective January 1, 1938. Account No. 175, "Contributions of Telephone Plant" is one of the accounts provided for in said Uniform [26] System of Accounts. A true copy of portions of said Uniform System of Accounts, in effect in 1941 and 1942, relating to Account No. 175, including the list of all balance sheet accounts, Instruction 20B relating to the plant asset accounts, and Instruction 175 relating to Account No. 175, is attached hereto, made a part hereof and designated as Exhibit "E."

In accordance with said Uniform System of Accounts plaintiff credited to Account 175 contributions by its subscribers for line extensions. Such contributions by subscribers for line extensions have never been reported by plaintiff as income for Federal income tax purposes and have never been taxed as income.

In 1945, the Federal Communications Commission amended said Uniform System of Accounts by eliminating Account No. 175 and instructing that the amounts held in such account be deducted from the appropriate plant asset accounts. Plaintiff in 1945, complied with these instructions with respect to the amounts in Account No. 175 which represented contributions for line extensions. However, Subaccount 175.2, referred to below, was retained intact because of said Order No. 406 of the Public Utilities Commission.

The increased installation and new supersedure charges were collected by plaintiff from subscribers from October 2, 1941, to May 1, 1942. Pursuant to said Order No. 379 of the Public Utilities Commission plaintiff credited amounts equal to its collections of the increased installation and new supersedure charges to a new Subaccount No. 175.2 entitled "Liability for Installation Charges." This new subaccount was started by plaintiff and maintained as a subaccount under the general Account No. 175, "Contributions of Telephone Plant" in order that the amounts in Subaccount 175.2 could be segregated from [27] the other amounts credited to Account No. 175 in accordance with the Commission's order.

The defendant does not concede or admit that the sums received by plaintiff from subscribers on account of the increased installation and new supersedure charges which were credited to Subaccount 175.2 were or are liabilities of the plaintiff.

In 1941, plaintiff received $13,341.50 on account of said increased and newly established installation and supersedure charges, and in 1942, plaintiff received $28,673 on account of said increased and newly established installation and supersedure charges. This total of $42,014.50 was adjusted to $41,970.50 in February, 1944, to correct an accounting error of $44.00 which was detected in reconciling the accounts.

VII.

Subaccount No. 175.2 was credited with all the increased installation and new supersedure charges collected by the plaintiff pursuant to the Public Utilities Commission Decision No. 51 and Order No. 379. These additional charges were not billed to the customer as such. The subscriber was billed in one sum for the total of his installation or supersedure charge. It was recorded on the bill as "Other Charges" and was explained by a supplemental statement sent out with the bill. This statement was entitled "Statement of Other Charges and Credits" and had several items listed on it. One of these items was "Service Connection Charge" and the installation or supersedure charge in one amount was recorded opposite this item. Although the billings to subscribers did not show the amount

of the increased installation charges separately from previously existing installation charges and did not show the newly established supersedure charges separately, plaintiff maintained its accounting records, as it was required to do by the order of the Public Utilities Commission, so as to reflect the amount of the increased [28] installation charges separately from the previously existing installation charges and so as to reflect the newly established supersedure charges separately from previously existing charges. The additional charges were all credited to Subaccount 175.2, "Liability for Installation Charges" and plaintiff maintained a record of the amount of the additional installation or supersedure charge paid by each customer so that the exact amounts of such payments could have been refunded to the individual customers if this were ever required.

The total cost to plaintiff of making new service connections exceeded the revenue from the tariffs charged therefor (even including the additional new connection charges authorized by the Public Utilities Commission Order No. 379). The cost of materials (including telephone instruments, switches, wiring and cables) and the cost of field labor required to make the installation were in the case of each new service connection capitalized by setting up such costs in plaintiff's plant asset account. These costs remain in the plant asset account until the instrument is removed and at the time of removal are charged to operations. Administration and office expenses in the case of new service con-

nections were charged off as expenses of operations in the year in which they were incurred. The total estimated cost of each new service connection was $13.92 during this period. The cost of materials and field labor which was capitalized as aforesaid was approximately 85 per cent of such total cost and the cost of administration and office expenses which was *expense* as aforesaid was approximately 15 per cent of such total cost.

The revenue from the tariffs charged for reconnections and supersedures under Public Utilities Commission Order No. 379 exceeded the total cost to plaintiff of making such reconnections [29] and supersedures. The costs of reconnection and the costs of supersedure were entirely charged off as expense of operations in the year incurred.

Additional revenue received by plaintiff on account of the increased installation and new supersedure charges established by Public Utilities Commission Order No. 379 was $41,970.50. Approximately 60.55 per cent of such total additional revenue was received on account of the additional service connection charges, 21.35 per cent on account of the additional reconnection charges and 18.10 per cent on account of the new supersedure charges.

With the exception of billing and the accounting necessary to keep the additional charges segregated from other charges, plaintiff was not required to and did not do any additional work or perform any additional services in order to receive the increased installation charges and the new supersedure

charges; that is, it did exactly the same work for subscribers in making connections and supersedures as it had done before the new charges were established and as it did after they were terminated.

Although Subaccount 175.2 was credited with the additional charges as they were collected and plaintiff's general cash account was debited, the moneys collected by virtue of the additional charges were intermingled with other moneys in the general treasury of plaintiff and were used by plaintiff without regard to their source. Plaintiff at all times material herein had on hand cash or marketable securities in excess of the amounts collected from subscribers for the increased installation charges and new supersedure charges. [30]

VIII.

Plaintiff maintains its records on the accrual basis, and files its tax returns on the accrual basis for the calendar year. Plaintiff did not report the aforesaid increased and newly established installation and supersedure charges received in 1941 and 1942, as part of its gross income in its tax returns for the years 1941 and 1942.

IX.

Plaintiff filed in due time its income tax, declared value excess profits tax, and excess profits tax returns for the calendar years 1941 and 1942, with the Collector of Internal Revenue of the United States for the District of Hawaii. The Report of Examination by the Internal Revenue

Agent in Charge, dated November 2, 1943, proposed deficiency assessments of taxes for those years on the grounds of failure to include as gross income the increased installation charges and the new supersedure charges hereinabove described. A protest of the proposed deficiency assessments on these grounds was filed with the Agent in Charge under date of July 28, 1944. The protest was denied by the Commissioner of Internal Revenue and a notice of determination of deficiency, dated January 8, 1945, was received by plaintiff. The deficiencies determined by the Commissioner on account of failure to include said charges in gross income were:

1941	Income Tax Liability		$ 1,978.47
	Excess Profits Tax Liability		6,959.35
1942	Declared Value Excess Profits Tax Liability		1,892.43
	Excess Profits Tax	$24,102.51	
	Less: 10% post war credit	2,410.25	21,692.26
Interest			4,205.88
	Total		$36,728.39

Said additional taxes and interest in the total amount of $36,728.39 for both years, were assessed and were paid by plaintiff on February 2, 1945, to Fred H. Kanne, the then Collector of Internal Revenue for the District of Hawaii. The payment of these taxes and interest were not charged to Account No. 175.2. Said Fred H. Kanne is now dead and is not in office as said Collector of Inter-

nal Revenue. Plaintiff filed duly executed claims for refund on December 6, 1946, for each of the calendar years 1941 and 1942, with the Collector of Internal Revenue of the United States for the District of Hawaii. The claim for refund for 1941 was for the total sum of $10,482.57 plus interest thereon as allowed by law, and the claim for refund for 1942 was for the total sum of $27,951.66 plus interest thereon as allowed by law. The Report of Examination of the Internal Revenue Agent in Charge, dated October 16, 1947, in connection with such claims for refund proposed that the claims be disallowed. On June 1, 1948, plaintiff received a notice of disallowance in full of both of such claims for refund from the Commissioner of Internal Revenue, such notice being dated May 19, 1948.

X.

During 1948, the Public Utilities Commission, following an application by the plaintiff for an increase in rates, made an investigation of and held a hearing on the plaintiff's rates and charges. A true copy of pages 6-28 and 6-29 of the plaintiff's application for a rate increase are attached hereto and made a part hereof and described as Exhibit "F." This portion of the application relates to the liability of the plaintiff for contributions to the Retirement System of Mutual Telephone [32] Company.

In 1931, plaintiff's Board of Directors established a jointly contributory retirement system to be

known as the "Retirement System of Mutual Telephone Company" to be operated under a board of managers consisting of the president of plaintiff and four other persons appointed by plaintiff's Board of Directors. The Retirement System is a separate entity from plaintiff and maintains its own books and accounts. Plaintiff does not have in its own accounts a "pension reserve" as such. Plaintiff reserved the right to discontinue or to reduce at any time its contributions to the Retirement System. An employee who took the necessary steps provided for in the Rules and Regulations of the Retirement System was credited with years of service put in prior to the establishment of the Retirement System and was issued a certificate (a true sample copy of which is attached hereto, made a part hereof and designated as Exhibit "G") stating that he was entitled to all the rights and privileges provided for by the Rules and Regulations of the Retirement System and that he was entitled to prior service credit of so many years, months and days in full for all service rendered prior to the 1st day of July, 1931. A true copy of the Rules and Regulations of the Retirement System of Mutual Telephone Company is attached hereto, made a part hereof and designated as Exhibit "H."

Although plaintiff did not suggest or request to the Commission at the time of the 1948 hearing that any action be taken with respect to Subaccount 175.2, the Commission on its own initiative in its Decision No. 102 considered the cost to plaintiff of the Retirement System and in Order No. 598 di-

rected that plaintiff "transfer the amount of $41, 970.50 [33] presently carried in Account 175.2, 'Contribution of Telephone Plant,' to its pension reserve to reduce the accrued liability for past service." "A true copy of portions of pages 6 and 7 of said Decision No. 102, relating to the transfer of the amount in Account No. 175 to the 'pension reserve,' and a true copy of said Order No. 598 is attached hereto, made a part hereof and designated as Exhibit I."

On December 3, 1948, the plaintiff addressed a letter to the Public Utilities Commission outlining the tax difficulties which had arisen in connection with the additional charges which had been credited to Subaccount No. 175.2. A true copy of the letter is attached hereto, made a part hereof and designated as Exhibit "J." The plaintiff in that letter requested that the Commission suspend paragraph 4 of Order No. 598 providing for the transfer of the funds from Subaccount No. 175.2 to plaintiff's "pension reserve" until a final determination of the amount transferable. On December 22, 1948, the Public Utilities Commission replied that this matter should be held in abeyance by the plaintiff pending formal approval by the Commission. On February 24, 1949, the Commission advised the plaintiff that at its meeting held January 27, 1949, it had denied plaintiff's request to suspend transfer to the "pension reserve" of the funds credited to Subaccount No. 175.2. On March 1, 1949, plaintiff deposited $41,970.50 in cash to the account of the Retirement System of Mutual Telephone Company in Bank of

Hawaii and deleted Subaccount No. 175.2, and on March 8, 1949 plaintiff advised the Public Utilities Commission of this action. [34]

Dated Honolulu, T. H., this 26th day of March, 1951.

MUTUAL TELEPHONE COMPANY,
Plaintiff,

By /s/ HEATON L. WRENN,
/s/ MARSHALL M. GOODSILL,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
Defendant,

By /s/ HOWARD K. HODDICK,
Acting United States Attorney, District of Hawaii,
Attorney for Defendant. [35]

EXHIBIT A

Before the Public Utilities Commission
of the Territory of Hawaii

Docket No. 764

In the Matter of

THE PETITION OF MUTUAL TELEPHONE COMPANY

PETITION

To the Honorable Public Utilities Commission of the Territory of Hawaii:

The petition of Mutual Telephone Company, here-

inafter referred to as petitioner, respectfully shows unto this Honorable Commission as follows:

I.

That petitioner, whose principal office is located at 1126 Alakea Street, Honolulu, Hawaii, is a corporation duly incorporated under the laws of the Kingdom of Hawaii, on or about August 16, 1883. That petitioner is now existing under and by virtue of the laws of the Territory of Hawaii, and is a regularly authorized public utility furnishing telephone service on the Islands of Hawaii, Maui, Molokai, Oahu and Kauai, Territory of Hawaii, and radio telephone service between said Islands as well as radio telephone service to the toll, radio telephone and connecting systems of the American Telephone & Telegraph Company of the United States and foreign countries and ships at sea, and also wireless telegraph service between the Islands of Oahu, Hawaii, Maui, Molokai, Lanai and Kauai. [41]

II.

That the presently effective classification of rates, tolls and charges of petitioner, and petitioner's presently effective rules and regulations affecting rates and service and information relating thereto, as far as its entire public business is concerned, are on file with the Public Utilities Commission of the Territory of Hawaii.

III.

That the present demands for service of petitioner are far in excess of the demand at any time

during the past history of petitioner. This increase is indicated by an increase in telephones of 3,783 in the Honolulu Exchange area for the first six months of 1941, as compared with a normal increase of 1,328 telephones for the first six months of 1940. The total station gain of petitioner for the month of July was 793 and that for the month of August was approximately 700, indicating that the abnormal rate of gain is steadily increasing and that the growing burden on petitioner's facilities is rapidly becoming acute. This unusual increase in service requirements has placed such a demand on central office facilities, as well as on the distribution plant, that service being rendered at the present time is not satisfactory. New equipment has been ordered and plans have been proposed to relieve this situation satisfactorily. This equipment will be sufficient to take care of anticipated increased demand for the balance of the year 1941. New equipment has already been ordered but not yet delivered and should be sufficient to take care of anticipated increased demand for service [42] at the present rate of increase for the first quarter of 1942. Recent advices from the manufacturers and suppliers of cable and equipment necessary for the expansion of petitioner's plant to meet this growth are to the effect that priorities on essential materials are becoming more stringent, and that longer delays in delivery are to be expected. The point has been reached where practically no commitments on delivery can be made unless orders are accompanied by a preference rating. If the present rate of gain

is maintained and deliveries cannot be improved, it must be expected that the time is not far off when the demand cannot be met, and application for telephone service must be refused. Army and Navy officials have expressed themselves as recognizing the importance to national defense of maintaining adequate telephone communications in the Territory and are helpful in procuring preference ratings on essential equipment, but they have also indicated their interest in efforts to prevent abnormal expansion, due to the need for vital raw materials in other defense efforts.

IV.

That it is the considered opinion of petitioner, in spite of any change in world conditions, short of actual warfare in the Territory of Hawaii, that demands on the system of petitioner in the Honolulu Exchange area will continue to increase and will be such for the next two or three years that increase in petitioner's plant will be required. It is the opinion of petitioner that when the present defense activities slacken in the next several years, and if petitioner in the meantime has continued to increase installation of central [43] office equipment and outside plant, that petitioner will have idle plant on hand when the defense program slackens.

V.

Petitioner believe it to be in the public interest that it as a public utility meet the demands for service which are made upon it but it also believes that for the protection of the normal subscribing public

and for the protection of its stockholders that definite action should be taken by it to meet the exigencies of the situation.

Petitioner is of the opinion that the increased demand on its facilities can be best met in the public interest by the Commission's—

(1) authorizing the increase of certain service connection charges;

(2) authorizing the increase and establishment of certain charges for supersedure of service; and

(3) authorizing and directing that the revenue from the new service and connection charges, over and above the amounts which would have been realized from the charges in the same respective catagories now in effect be kept in a separate account, the disposition of which may be determined at a later date.

VI.

If petitioner increases its plant facilities on the Island of Oahu to meet the present demand for service at the present rate, it will require a capital outlay during 1942 alone of $1,575,488, while if the present rate of growth drops 50 per cent, the estimated capital outlay required to increase plant facilities for such growth during 1942 will be [44] $1,275,716; that should the present rate of growth continue beyond 1942, it is believed that the capital outlay over and above that required for normal growth would be even greater in proportion than in 1942. That filed herewith are the following exhibits:

Exhibit 1

Preliminary provisional estimate for 1942 of petitioner showing estimated construction and maintenance expenditures for that year;

Exhibit 2

Preliminary provisional estimate for 1942 of petitioner showing estimated construction and maintenance expenditures for that year if present rate of growth drops 50 per cent beginning August 1, 1941.

VII.

Petitioner recommends that the following service connection charges contained on Schedule B-1 for all Exchanges be amended, effective as soon as practicable in so far as such charges apply to Zones 1 and 2 of the Honolulu Exchange area as follows:

(a) That the connecting charge for an individual primary business station be increased from $3.50 to $15.00;

(b) That the connecting charge for a primary party business station be increased from $3.50 to $10.00;

(c) That the connecting charge for residence primary individual station be increased from $3.50 to $10.00;

(d) That the connecting charge for residence primary party line station be increased from $3.50 to $7.50;

(e) That the connecting charge for a private branch exchange trunk line be increased from $3.50 to $15.00;

(f) That the connecting charge for a private branch exchange primary station be increased from $3.50 to $10.00; [45]

(g) That the charge for establishment of service by the use of instrumentalities already in place upon the subscriber's premises, and where no change is made in the type or location of those instrumentalities, be increased from a non-classified flat charge of $1.50 to the following classified charges:

1. Business primary line.....$10.00
2. Residence primary individual line... 7.50
3. Residence primary party line..... 5.00

(h) That the following charges for supersedure be fixed:

1. Business primary station.....$ 5.00
2. Residence primary station..... 3.50

VIII.

Petitioner is of the opinion that the increase in installation charges will unquestionably retard the increased demand on its services to an extent which it is impossible to accurately forecast. Filed herewith are the following exhibits:

Exhibit 3

Exchange Service Schedule B-1 as proposed to be amended so as to pertain to service connection charges for all exchanges except Honolulu;

Exhibit 4

Exchange Service Schedule B-1-A pertaining to

service connection charges for Zones 1 and 2 in the Honolulu Exchange area.

Wherefore petitioner prays that a hearing may be had upon this petition and that upon a hearing thereof petitioner be authorized and directed to make the service charges herein requested and that petitioner be authorized and directed to purchase such additional equipment as may be necessary in order to meet the growing demand for service in Honolulu and that [4] petitioner be authorized and directed to keep the revenue from the new service and connection charges, over and above the amounts which would have been realized from the charges in the same respective categories now in effect, in a separate account, the disposition of which may be determined at a later date.

Dated at Honolulu, Hawaii, this 10th day of September, 1941.

MUTUAL TELEPHONE COMPANY,

By /s/ ALVAH A. SCOTT,
Its President,

By /s/ W. C. AVERY,
Its Treasurer. [47]

Territory of Hawaii,
City and County of Honolulu—ss.

Alvah A. Scott, being first duly sworn, on oath deposes and says: That he is President of Mutual Telephone Company, the within named petitioner; that he makes this verification for and on behalf of

said petitioner and is authorized so to do; that he has read the foregoing petition, knows the contents thereof, and the same are true.

/s/ ALVAH A. SCOTT.

Subscribed and sworn to before me this 10th day of Sept., 1941.

/s/ GEORGE B. PALMER,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission Expires June 30, 1945. [48]

EXHIBIT B

Before the Public Utilities Commission of the Territory of Hawaii

Docket No. 764

In the Matter of

The Petition of the MUTUAL TELEPHONE COMPANY, for an Increase in Certain Service Connection Charges; for an Increase and Establishment of Supersedure Charges; for Approval of Certain Capital Expenditures; and for Authority to Keep Additional Revenues From Increased Charges in a Separate Account.

Decision No. 51

Before: V. B. Libbey, Chairman;
A. H. Rice, Commissioner;
F. G. Manary, Commissioner;
W. L. S. Williams, Commissioner;
L. L. PATTERSON, Commissioner.

DECISION

The Mutual Telephone Company filed its petition with the Commission on July 19, 1941, requesting authorization for the following:

"(1) authorizing the increase of certain service connection charges;

"(2) authorizing the increase and establishment of certain charges for supersedure of service; and

"(3) authorizing and directing the petitioner to meet the increased demands that are being made for its service and providing that all equipment purchased to meet such demands be included in its rate base, even though when the demand slackens a portion of such additional equipment may become idle for an appreciable period of time."

At date of August 6, 1941, a public hearing was held. Testimony was adduced and exhibits presented both by the Company's and the Commission's witnesses.

At date of September 10, 1941, the Company filed a discontinuance of the above described petition, and in lieu thereof a new petition was filed requesting a public hearing be held and that petitioner be authorized to establish new "connection" and "supersedure" charges in Zones 1 and 2 of the Honolulu Exchange area only, the proposed increased charges being as follows:

"(a) That the connecting charge for an individual primary business station be increased from $3.50 to $15.00;

"(b) That the connecting charge for a primary party business station be increased from $3.50 to $10.00;

"(c) That the connecting charge for residence primary individual station be increased from $3.50 to $10.00;

"(d) That the connecting charge for residence primary party line station be increased from $3.50 to $7.50; [51]

"(e) That the connecting charge for a private branch exchange trunk line be increased from $3.50 to $15.00;

"(f) That the connecting charge for a private branch exchange primary station be increased from $3.50 to $10.00;

"(g) That the charge for establishment of service by the use of instrumentalities already in place upon the subscriber's premises, and where no change is made in the type or location of those instrumentalities, be increased from a non-classified flat charge of $1.50 to the following classified charges;

"1. Business primary line.....$10.00
"2. Residence primary individual line. 7.50
"3. Residence primary party line..... 5.00

"(h) That the following charges for 'supersedure' be fixed:

"1. Business primary station.....$ 5.00
"2. Residence primary station..... 3.50"

In addition thereto the Company also requests that it "be authorized and directed to purchase such

additional equipment as may be necessary in order to meet the growing demand for service in Honolulu, and that petitioner be authorized and directed to keep the revenue from the new service and connection charges, over and above the amounts which would have been realized from the charges in the same respective categories now in effect, in a separate account, the disposition of which may be determined at a later date."

A public hearing was held on the latter petition at date of September 18, 1941. Testimony and evidence was presented by Company representatives and the staff of the Commission. It appears from the record that an extraordinary increase in telephone installations and capital outlay for fixed property for the current period on the Island of Oahu is required.

From the record of the hearing and the records of the Commission the following information relating to operations on the Island of Oahu has been compiled:

Date	Connected Phones	Book Cost of Fixed Property in Service	Depreciation Reserve	Book Cost Less Depreciation Reserve
12/31/38	23,881	$6,212,137	$1,987,333	$4,224,804
12/31/39	27,053	6,810,553	1,969,587	4,840,966
12/31/40	30,757	7,511,776	2,018,614	6,493,162
6/30/41	34,001	8,239,396	2,077,761	6,161,635

The average monthly net increase in phones connected may be computed to be:

1939 264
1940 309
1941 (6 mos.) 630

Net property additions in 1939 and 1940 were $616,162 and $652,196, respectively. In 1941 and 1942 the estimates are $1,592,715 and 1,231,460. [52]

Net Investment, Total Revenue and Income figures are shown below:

Year Ending	Net Investment Av. for Year	Total Revenue	Income Available for Return	Rate of Return on Net Investment
12/31/39	$4,532,885	$1,548,356	$363,056	8.0%
12/31/40	5,167,064	1,768,199	411,235	8.0
12/31/41	6,289,519*	2,092,538*	455,369*	7.2*

* Estimated.

A rapid rate of increase in number of connected phones and in investment to render the service is shown.

The company witnesses attributed the over and above normal increase to defense activity. In this we feel they are correct. The presence of the fleet, the heavy construction program, etc., which has resulted in increased business, an abnormal increase in population and increased family incomes have naturally created an increased demand for tlephone service.

The Company witnesses expressed the fear that this demand was of a temporary nature and that

as the defense activity slackened the Company would be left with a considerable amount of property not used and useful in rendering communication service for the community. We believe that their fears in this respect are well founded.

With a book cost of $8,239,396 and 34,001 phones in service in Oahu as of June 30, 1941, it appears that each connected phone represents a total investment of $242.33. On an average life of all property of 23 years on a six per cent Rate of Return and six per cent Sinking Fund Curve Depreciation basis, this represents an annual cost for Capital and Depreciation of $19.96.

On an "investment basis" for computing rates, this would involve an annual charge in rates of approximately this amount for each phone that may become idle as defense activity slackens. The investor faces an equivalent defficiency in return if the property is not allowed as used and useful. The proposed increased charges are estimated to increase annual revenue by approximately $78,000.00 per year if the present rate of increase in connections continues.

The Company makes no showing that such an increase in revenue is required, and we believe it improper to allow the increase to go through in a manner that would permit the increase to be passed on to the common stockholders in the form of increased dividends.

The Company witnesses felt that the income would not increase to this extent owing to the re-

tarding effect that the increased charges would have on prospective new installations. While they did not contend that additional income was required they did contend that the additional charges were required for the retarding effect.

The increase over present charges would be credited to Account No. 175, Contributions to Telephone Plant, and in computing rates on an "investment basis" would be a reduction from the net investment in arriving at a rate base. Investors would not require a return and subscribers would be spared paying a capital charge on same. On motion of the Commission or upon application of the Company, other disposition of the accrued balance might be made as conditions warranted.

We feel that the Company may properly submit for approval rules providing [53] additional charges for various classes of service to be handled in the same manner.

The Commission in approving the increase and establishment of said charges, does not intend that such approval is to be construed as a finding of reasonableness of such charges or practices and is of the opinion that said charges should be but temporary, and that withdrawal of such approval should be made at such time as the Commission deemed appropriate.

Whether or not it is the Company's obligation to meet the current extraordinary demand for service is a very far-reaching question that we have not considered.

An Order conforming to the above Decision will issue.

Done at Honolulu, City and County of Honolulu, Territory of Hawaii, this 1st day of October, 1941.

PUBLIC UTILITIES COMMISSION OF THE TERRITORY OF HAWAII,

By /s/ V. B. LIBBEY,
Its Chairman,

By /s/ A. H. RICE,
Commissioner,

By /s/ F. G. MANARY,
Commissioner,

By /s/ L. L. PATTERSON,
Commissioner,

By /s/ W. L. S. WILLIAMS,
Commissioner.

Attest:

I, J. R. Kenny, Executive Secretary of the Public Utilities Commission of the Territory of Hawaii, do hereby verify that the foregoing Decision No. 51 is a full, true and complete copy of original on file in the office of the Commission.

[Seal] /s/ J. R. KENNY,
Secretary. [54]

Before the Public Utilities Commission
of the Territory of Hawaii

Docket No. 764

In the Matter of

The Petition of the MUTUAL TELEPHONE COMPANY, for an Increase in Certain Service Connection Charges; for an Increase and Establishment of Supersedure Charges; for Authority to Keep Additional Revenues From Increased Charges in a Separate Account; and for Amendment of Rule No. 15.

ORDER No. 379

A Decision in the above-entitled matter having been rendered, it is

Ordered, that the Petitioner is hereby authorized to place in effect as of October 1, 1941, the following service connection and supersedure charges, viz.:

Exchange Service Schedule No. B-1

Service Connection Charges	All Exchanges Except Honolulu

Service Connection Charges applicable to all exchange service facilities furnished within the Exchange Area of all exchanges except Honolulu.

(A) The charge for each of the following listed units of facilities upon application for installation shall be:

(1) Individual or party line service:

Each business primary line station	$ 3.50
Each residence primary line station	3.50
Each business or residence extension	1.50

(2) Private Branch Exchange Service:

Each trunk line	3.50
Each primary station	3.50
Each extension station	1.50

(B) For establishment of service by the use of instrumentalities already in place upon the subscriber's premises and where no change is made in the type or location of those instrumentalities 1.50

(1) This charge does not apply in the case of a supersedure.

(C) If at the subscriber's request, a change is made in location or type of facilities, the charge for Moves and Changes are applicable to the change, provided the total charges shall not exceed the charges for the initial establishment of service as classified in paragraph (A).

The application of the above service connection charges with exceptions, is covered in Rule and Regulation No. 15. [55]

Exchange Service Schedule No. B-1a

Service Connection Charges Honolulu Exchange

Service Connection Charges applicable to all exchange service facilities furnished with the Honolulu exchange area:

(A) The charge for each of the following listed

units of facilities upon application for new installation shall be:

(1) Individual or party line service:

Each business primary individual station	$15.00
Each business primary party line station	10.00
Each residence primary individual station	10.00
Each residence primary party line station	7.50
Each business or residence extension	1.50

(2) Private Branch Exchange Service:

Each trunk line	$15.00
Each primary station	10.00
Each extension station	1.50

(B) For establishment of service by the use of instrumentalities already in place upon the subscriber's premises and where no change is made in the type of location of those instrumentalities.

Each business primary individual or party line station	$10.00
Each residence primary individual station	7.50
Each residence party line station	5.00

(C) For supersedure of service including the transfer of the telephone number from one party to another, with no change in type or location of equipment:

Each business primary individual or party line station	$ 5.00
Each residence primary individual or party line station	3.50

(D) If, at the subscriber's request, a change is made in location or type of facilities, the charge for Moves and Changes are applicable to the change, provided the total charges shall not exceed the charges for the initial establishment of service. (As classified in paragraph (A), omitted.) The application of the above service connection charges, with exceptions, is covered in Rule and Regulation No. 15.

The amounts representing the increase in connection charges and charges for supersedure of service over and above those which are now being charged by petitioner in the same respective categories and the newly established charges for supersedure of service where no charge has been previously made, shall be charged to Account No. 175, Contributions to Telephone Plant, the amounts so accruing to be segregated from other charges to said account.

And Further, that Section (d) of Rule No. 15 of Petitioner's Rules and Regulations now in effect, is hereby amended to read as follows, viz.:

> "(d) Service connection charges do not apply in connection with supersedure of service, except as set forth in Exchange Service Schedule B-1a, covering the Honolulu [56] Exchange."

This Order supersedes Commission's Order No. 294 dated July 11, 1938, only insofar as it applies to Schedule B-1.

Done at Honolulu, City and County of Honolulu, Territory of Hawaii, this 1st day of October, 1941.

PUBLIC UTILITIES COMMISSION OF THE TERRITORY OF HAWAII,

By /s/ V. B. LIBBEY,
Its Chairman,

By /s/ A. H. RICE,
Commissioner,

By /s/ F. G. MANARY,
Commissioner,

By /s/ L. L. PATTERSON,
Commissioner,

By /s/ W. J. S. WILLIAMS,
Commissioner.

Attest:

I, J. R. Kenny, Executive Secretary of the Public Utilities Commission of the Territory of Hawaii, do hereby certify that the foregoing Order No. 379 is a full, true and complete copy of original on file in the office of the Commission.

[Seal] /s/ J. R. KENNY,
Secretary. [57]

EXHIBIT C

Before the Public Utilities Commission
of the Territory of Hawaii
Docket No. 785

In the Matter of
The Petition of MUTUAL TELEPHONE COMPANY

PETITION

To the Honorable Public Utilities Commission of the Territory of Hawaii:

The petition of Mutual Telephone Company, hereinafter referred to as petitioner, respectfully shows unto this Honorable Commission as follows:

I.

That petitioner, whose principal office is located at 1126 Alakea Street, Honolulu, Hawaii, is a corporation duly incorporated under the laws of the Kingdom of Hawaii, on or about August 16, 1883. That petitioner is now existing under and by virtue of the laws of the Territory of Hawaii and is a regularly authorized public utility furnishing telephone service on the Island of Hawaii, Maui, Molokai, Oahu and Kauai, Territory of Hawaii, and radio telephone service between said Islands as well as radio telephone service to the toll, radio telephone and connecting systems of the American Telephone & Telegraph Company of the United States and foreign countries and ships at sea, and also wireless telegraph service between the Islands of Oahu, Hawaii, Maui, Molokai, Lanai and Kauai.

II.

That the presently effective classification of rates, tolls and charges of petitioner, and petitioner's presently effective rules and regulations affecting rates and service and information relating thereto, as far as its entire public business is concerned, are on file with the Public Utilities Commission of the Territory of Hawaii. [60]

III.

That pursuant to Decision No. 51 and Order No. 379 filed by the commission on October 24, 1941, the Commission approved the increase of certain service connection charges and the increase and establishment of certain charges for supersedure of service for Zones 1 and 2 of the Honolulu Exchange area, which said charges are more fully set forth in the said decision and order. That the increase in said connection charges and the establishment of new supersedure charges had for its primary purpose the discouragement in the abnormal demand for the Company's service. That petitioner has been directed by letter dated April 10, 1942 of Colonel Carroll A. Powell, U. S. Army Signal Corps, to assist in establishment of a system of priorities for telephone allocations. A copy of said letter of April 10, 1942 is field herewith, marked Exhibit A, and made a part hereof. Under the circumstances and since the primary reason for the entering of Decision No. 51 and Order No. 379 has been obviated by the said directive of April 10, 1942, petitioner believes that it is advisable that the Commission enter

an order, effective as of April 1, 1942, reestablishing the connection charges and supersedure rates which were in effect on September 30, 1941.

IV.

That the present service connection charges and charges for supersedure of service for the Honolulu Exchange, as approved by Decision No. 51 and Order No. 379, are set forth on Schedule No. B-1a of petitioner's schedule of rates, which schedule is filed herewith, marked Exhibit B, and made a part hereof.

V.

That the service connection charges and charges for supersedure of service which were in effect on September 30, 1941, and which petitioner believes should be reestablished for the Honolulu Exchange are set forth on Schedule No. B-1, filed herewith as Exhibit C and made a part hereof, which schedule was amended by the said Decision and Order to apply to all Exchanges except Honolulu.

VI.

That Section (d) of Rule 15 of Petitioner's Rules and Regulations, as amended by said Decision and Order, reads as follows: [61]

> "(d) Service connection charges do not apply in connection with supersedure of service, except as set forth in Exchange Service Schedule B-1a covering the Honolulu Exchange."

That in connection with the reestablishment of the former connection charges Section (d) of Rule 15 should be amended to read as follows:

> "(d) Service connection charges do not apply in connection with supersedure of service."

VII.

That in said Decision and Order petitioner was directed to charge to Account No. 175, entitled "Contributions to Telephone Plant" receipts representing the increase in connection charges and charges for supersedure of service over and above those which were in effect just prior to the effective date of the order in the same respective categories and the newly established charges for supersedure of service, where no charge had previously been made, and to segregate said receipts from other charges to said account; that petitioner has charged all such moneys received since October 1, 1941, to a sub-account in said Account No. 175, which said sub-account is entitled "175.2—Liability for Installation Charges"; that the accrued amount set forth in said sub-account No. 175.2 received from the aforesaid sources and segregated by petitioner from other moneys in said account was, as of February 28, 1942, $27,094.50; that petitioner believes that the amount of receipts in said special account, as of the effective date of the order herein sought to be made reestablishing the former connection charges and charges for supersedure of service should be recaptured by the company as income, in install-

ments spread equally over a five-year period beginning with the calendar year 1942.

Wherefore, petitioner prays that a hearing may be had upon this petition; that upon a hearing thereof the Commission make an order—(1) establishing for all Exchanges, effective May 1, 1942, the service connection charges and rates for supersedure of service set forth on Schedule B-1 now applicable to all Exchanges except Honolulu; (2) amending Section (d) of Rule 15 as set forth in Paragraph VI of this petition, and (3) authorizing petitioner to recapture as income, installments spread equally over a five-year period, beginning with [62] the calendar year 1942, the aggregate amount of receipts charged to said sub-account No. 175.2 up to and including May 1, 1942.

Dated Honolulu, Hawaii, April 21, 1942.

MUTUAL TELEPHONE COMPANY,

By /s/ ALVAH A. SCOTT,
Its President,

By /s/ W. C. AVERY,
Its Treasurer.

Territory of Hawaii,
City and County of Honolulu—ss.

Alvah A. Scott, being first duly sworn, on oath deposes and says: That he is President of Mutual Telephone Company, the within-named petitioner; that he makes this verification for and on behalf of

said petitioner and is authorized so to do; that he has read the foregoing petition, knows the contents thereof, and the same are true.

/s/ ALVAH A. SCOTT.

Subscribed and sworn to before me this 21st day of April, 1942.

/s/ GEORGE B. PALMER,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1945. [64]

EXHIBIT D

Before the Public Utilities Commission of the Territory of Hawaii

Docket No. 785

In the Matter of

The Petition of the MUTUAL TELEPHONE COMPANY, for the Re-establishment of Certain Service Connection Charges and Supersedure Charges, Amending Section (d) of Rule No. 15 and for Recapture as Income of Receipts Charged to Sub-account No. 175.2.

Decision No. 57

Before: V. B. Libbey, Chairman;
A. H. Rice, Commissioner;
F. G. Manary, Commissioner;
W. E. Eklund, Commissioner.

Decision

The Mutual Telephone Company filed a Petition with the Commission on April 22, 1942, requesting authorization for the following:

(1) "establishing for all Exchanges, effective May 1, 1942, the service connection charges and rates for supersedure of service set forth in Schedule B-1 now applicable to all Exchanges except Honolulu;

(2) amending Section (d) of Rule 15 as set forth in Paragraph VI of Petition; and

(3) Authorizing petitioner to recapture as income in installments spread equally over a five-year period, beginning with the calendar year 1942, the aggregate amount of receipts charged to sub-account No. 175.2 up to and including May 1, 1942."

Representatives of the Company appeared before the Oahu members of the Commission at date of April 20, 1942, and acknowledged that the results which had been anticipated by the installation of these charges had not been attained. This fact was substantiated by the submission of figures showing a continued abnormal increase of new phone installations subsequent to the creation of these increased charges. In addition it was also pointed out that upon order of the Military authorities a system of priorities had been ordered into effect; that such system would be administered through certain designated representatives [66] appointed by the Office of the Signal Officer at Fort Shafter, T.H., and that by adherence to this system the pres-

ent increased charges for new installations and supersedures would not be necessary.

At date of April 29, 1942, the Auditor for the Commission after an investigation prepared a report on the subject matter, recommending therein that under the existing circumstances it was in the interest of all parties concerned that the charges for installation and supersedures established by Commission's Decision No. 51 and Order No. 379 should be canceled and the rates in effect prior to October 1, 1941, for this type of service should be reestablished. The Commission is therefore of the opinion that the said increased charges for new installations and supersedures authorized by its above numbered Decision and Order should be canceled and the rates and charges set forth in Schedule B-1 of Order No. 294 should be reestablished.

Section (d) of Rule 15 applicable thereto therefore also becomes subject to change in order to be consistent with the reestablishment of charges outlined above, and it is, therefore the opinion of the Commission that this rule as amended should read as follows:

> "(d) Service connection charges do not apply in connection with supersedure of service."

Petitioner's request for authorization to recapture as income in intallments spread equally over a five-year period, beginning with the calendar year 1942, the aggregate amount of receipts charged to

account No. 175.2 up to and including May 1, 1942, from the evidence and testimony presented does not appear to the Commission to be the proper method by which this amount should be accounted for after giving consideration to the purposes for which these monies were obtained from subscribers. As stated by the Commission in its Decision No. 51 authorizing these charges, it was at that time intended that these funds would become a deduction from the computation of rate base figures and that subscribers would be spared paying a capital charge on same. It does not appear to the Commission that the status of these funds has changed since that time and it is therefore the Decision of the Commission that the accrued balance in account No. 175.2 shall, until further orders of the Commission, be considered as "Contribution to Telephone Plant" and be treated as a reduction of the net investment in arriving at a rate base. The Commission further decides, however, that upon motion of the Commission or [67] upon application of the Company at some future date, other disposition of the accrued balance in said account No. 175.2 might be made as conditions warrant.

An Order conforming to the above Decision will issue.

Done at Honolulu, City and County of Honolulu, Territory of Hawaii, this 16th day of July, 1942.

PUBLIC UTILITIES COMMISSION OF THE TERRITORY OF HAWAII,

By /s/ V. B. LIBBEY,

Its Chairman,

By /s/ A. H. RICE,
Commissioner,

By /s/ W. E. EKLUND,
Commissioner,

By /s/ F. G. MANARY,
Commissioner. [68]

Before the Public Utilities Commission of the Territory of Hawaii

Docket No. 785

In the Matter of

The Petition of the MUTUAL TELEPHONE COMPANY, for the Re-establishment of Certain Service Connection Charges and Supersedure Charges, Amending Section (d) of Rule No. 15 and for Recapture as Income of Receipts Charged to Sub-account No. 175.2.

ORDER No. 406

A Decision in the above-entitled matter having been rendered, it is Ordered, that Petition is hereby authorized to cancel the service connection and supersedure charges authorized in Commission's Order No. 379, and to place in effect as of May 1, 1942, the following service connection and supersedure charges, viz:

Exchange Service Schedule No. B-1

Service Connection Charges — All Exchanges

Service Connection Charges applicable to all ex-

change service facilities furnished within the Exchange Area of all exchanges.

(A) The charge for each of the following listed units of facilities upon application for installation shall be:

(1) Individual or party line service:

Each business primary line station..	$3.50
Each residence primary line station.	3.50
Each business or residence extension	1.50

(2) Private Branch Exchange Service:

Each trunk line.....	3.50
Each primary station.....	3.50
Each extension station.....	1.50

(B) For establishment of service by the use of instrumentalities already in place upon the subscriber's premises and where no change is made in the type or location of those instrumentalities, $1.50.

(1) This charge does not apply in the case of a supersedure.

(C) If at the subscriber's request, a change is made in location or type of facilities, the charge for Moves and Changes are applicable to the change, provided the total charges shall not exceed the charges for the initial establishment of service as classified in paragraph (A). The application of the above service connection charges, with exceptions, is covered in Rule and Regulation No. 15. [69]

It is further ordered that Section (d) of Rule 15 of Petitioner's Rules and Regulations be amended and that upon amendment the said Rule will read, as follows:

"(d) Service Connection charges do not apply in connection with supersedure of service."

It is further ordered that the amount of monies collected by Petitioner through the increased installation and supersedure charges as authorized by Commission's Order No. 379 shall be retained in Sub-account No. 175.2 "Contributions to Telephone Plant" and shall not be taken into the income account until such time as the Commission may authorize such action.

This Order supersedes Commission's Order No. 379 dated October 1, 1941.

Done at Honolulu, City and County of Honolulu, Territory of Hawaii, this 15th day of July, 1942.

PUBLIC UTILITIES COMMISSION OF THE TERRITORY OF HAWAII,

By /s/ V. B. LIBBEY,
Its Chairman,

By /s/ A. H. RICE,
Commissioner,

By /s/ W. E. EKLUND,
Commissioner,

By /s/ F. G. MANARY,
Commissioner. [70]

EXHIBIT "E"

Extracts from the "Uniform System of Accounts" Prescribed by the Federal Communications Commission, Issue of June 19, 1935, Effective January 1, 1936

Balance-Sheet Statements

I. Investments

Asset Side:

100.1. Telephone plant in service.
100.2. Telephone plant under construction.
100.3. Property held for future telephone use.
100.4. Telephone plant acquisition adjustment.
101.1. Investments in affiliated companies.
101.2. Advances to affiliated companies.
102. Other investments.
103. Miscellaneous physical property.
104. Sinking funds.
105. Company securities owned.

II. Current Assets

113. Cash.
114. Special cash deposits.
115. Working funds.
116. Temporary cash investments.
117.1. Notes receivable from affiliated companies.
117.2. Other notes receivable.
118. Due from customers and agents.
120.1. Accounts receivable from affiliated companies.
120.2. Other accounts receivable.
121. Interest and dividends receivable.
122. Material and supplies.

123. Other current assets.

III. Other Assets

126. Subscription to capital stock.
127. Subscriptions to funded debt.

IV. Prepaid Accounts and Deferred Charges

129. Prepaid rents.
130. Prepaid taxes.
131. Prepaid insurance.
132. Prepaid directory expenses.
133. Other prepayments.
134.1. Discount on capital stock.
134.2. Capital stock expense.
135. Discount on long-term debt.
136. Provident funds.
137. Insurance and other funds.
138. Extraordinary maintenance and retirements.
139. Other deferred charges.

Liability Side:

V. Stock

150. Capital stock.
151. Stock liability for conversion.
152. Premium on capital stock.
153.1. Capital stock subscribed.
153.2. Installments paid on capital stock.

VI. Long-Term Debt

154.1. Funded debt.
154.2. Funded debt subscribed.
155. Receivers' certificates.
156. Advances from affiliated companies.
157. Other long-term debt.

VII. Current Liabilities

158.1. Notes payable to affiliated companies.
158.2. Other notes payable.
159.1. Accounts payable to affiliated companies.
159.2. Other accounts payable.
160. Customers' deposits.
162. Matured interest and dividends.
163. Matured long-term debt.
164. Advance billing and payments.
165. Other current liabilities.

VIII. Accrued Liabilities Not Due

166. Taxes accrued.
167. Unmatured interest, dividends, and rents accrued.

IX. Deferred Credits and Reserves

168. Premium on long-term debt.
169. Insurance reserve.
170. Provident reserve.
171. Depreciation reserve.
172. Amortization reserve.
173. Employment stabilization reserve.
174. Other deferred credits.

X. Contributions of Telephone Plant

175. Contributions of telephone plant.

XI. Surplus

180. Surplus reserved.
181. Unappropriated surplus. [73]

Instruction 20. (B)

"Telephone plant contributed to the company or

constructed by it through expenditures of contributions of money or its equivalent shall be charged to the telephone plant accounts at its original cost (estimated if not known) and there shall be credited to the depreciation reserve and amortization reserve accounts the estimated amounts of the reserve requirements, if any, applicable to the plant. The difference between the amounts so includible in the telephone plant and the reserve accounts shall be credited to account 175, 'Contributions of telephone plant.'

Note.—Amounts received for construction which are ultimately to be repaid wholly or in part, shall be credited to account 174; when final determination has been made as to the amount to be returned, any unrefunded amounts shall be credited to account 175."

Account Number 175

"Contributions of telephone plant.—(A) This account, in accordance with instruction 20-B, shall include the amounts of money or its equivalent contributed directly or indirectly for or in connection with the construction or acquisition of telephone plant. The records shall be kept so that the amount and description of each contribution and from whom received will be readily available.

(B) When the service, in connection with which the contribution was made, is permanently discontinued by the company the amount in this account with respect to that service shall be debited hereto and credited to account 402, 'Miscellaneous credits to surplus.'

Note.—Except as provided in paragraph (B) the amounts of contributions shall be permanently carried in this account."

EXHIBIT F

VI. Operating Expenses

Ac. 672—Relief and Pensions

Costs and expenses in connection with the employees' pension system are charged to this account. The portion of such costs and expenses applicable to construction and custom work is credited to this account. The charges and credits to this account for the years 1946 and 1947 are tabulated below:

Subac. No.	Relief and Pensions (Ac. 672)	1946 Amount	%	1947 Amount	%	% Increases
672-131	Service Pension Accruals	$110,152.17	94.45	$147,230.81	93.74	33.66
672-138	Overhead Constr. Costs—Cr.	5,435.38	4.66	9,634.26	6.13	77.25
672-231	Service Pension Accruals—Transpacific	7,596.21	6.51	9,464.88	6.03	24.60
672-331	Service Pension Accruals—Interisland	2,770.07	2.38	7,947.39	5.06	86.90
672-431	Service Pension Accruals—Wireless	1,535.82	1.32	1,987.49	1.26	29.41
672-731	Service Pension Accruals—Mobile	.....	.....	58.60	.04	.....
	Total	$116,618.89	100.00	$157,054.91	100.00	34.67
	Index	74.25		100.00		

The company's pension system was established on July 1, 1931. It was, and is, a joint contributory system. The contributions of employees were originally set actuarially so as to produce, when matched

by the company, a total retirement allowance of approximately 1½% times the employee's average pay for the last ten years of service times his total creditable service. This was not a guaranteed 1½% but a so-called "money purchase plan" whereby the actual retirement allowance was based on the employee's accumulated contributions, with interest, matched by the company, and the total thus providing an annual retirement allowance based on mortality tables. Due in part to changes in mortality tables, also to some decrease in return on invested funds of the pension system and to wage increases during recent years being more rapid than originally estimated, the actual retirement allowance during recent years dropped somewhat below the 1½% originally contemplated. Accordingly, amendments were made to the Rules and Regulations of the pension system, effective July 1, 1946, which provided a guaranteed 1½% times average pay for the last ten years times years of service. No change was made in the percentage of wages contributed by the employee. Therefore, this amendment had two principal effects as far as contributions by the company were concerned. It increased the payments required to meet current accruing liabilities, and it also increased the total amount of liability for service prior to the establishment of the system in 1931, and therefore the contributions by the company required to amortise this latter amount.

The pension system as originally set up provided for retirement at age sixty. If an employee continued to work for the company after age sixty,

he made no further contributions, and the additional years of service after his sixtieth birthday were not counted in computing his retirement allowance. The amendments of July 1, 1946, changed this provision so that now, if an employee continues to work after age sixty, he will continue to make his normal contributions to the system, and the additional years of service will be counted in computing his retirement pay. This latter amendment also had an effect in increasing the liability for past service. The rapid increase in wages during the past few years has been another factor which increased the liability for past service. [77]

VI. Operating Expenses

At the time the pension system was established in 1931, the liability for past service amounted to approximately $234,000. Contributions made by the company to the system from 1931 through 1947 have totaled $1,180,108. This amount has been apportioned by the Actuary toward amortizing the past service liability and meeting current accruing liabilities. It was originally estimated that the past service liability would be amortized 30 years after the establishment of the system. The amendments made in 1946, together with the rapid increase in wages, have, however, substantially increased the accrued liability for past service, and the company's contributions to the system at the time of these amendments were also increased from 4.09% of pay roll to 5%. The company's contribution of 5% of pay roll, was made up of 3.34% for current

liabilities and 1.66% for accrued liability for past service, for the year 1947. Investments of the system, as of June 30, 1947, to $1,214,515.84 in bonds and $751,226.37 in stocks, or a total of $1,965,742.41.

The Actuary estimated at the time the amendments became effective that the past service liability would be amortized in 39 years from that time. The total amount of the past service liability as reported by the Actuary on June 30, 1947, was $812,111.

Ac. 675—Other Expenses:

Included in this account are all operating expenses not properly chargeable to other accounts such as directors fees, audits, dividend expenses, costs of publishing annual reports to stockholders and valuation expenses. The expenses charged Ac. 675 amounted to $19,088.47 in 1946 and $22,245.35 in 1947 or an increase of 16.5%. These expenses constituted about 2.5% of the total general and other operating expenses for the year 1947.

Ac. 677—Expenses Charged Construction—Credit:

This account is credited and the appropriate construction accounts charged with amounts representing a portion of general office salaries and expenses applicable to construction work.

In determining the credits to Ac. 677, the ratio of General Expense Accounts 661, 662.1, 663.2 and 665.3-139 to total pay rolls is first established:

$$\text{General Expense Ratio} = \frac{\text{Acs. 661, 662.1, 663.2 and 665.3-139} = \text{(A)}}{\text{Total Payrolls}}$$

The ratio between the portion of clearing accounts cleared to construction and the total clearing accounts is next established:

$$\text{Clearing Ac. Ratio} = \frac{\text{Clearances to Construction} = (B)}{\text{Total Clearances}}$$

The clearing account ratio (B) is applied to the labor charges in the same clearing accounts which produce the estimated labor in clearing accounts charged construction. This result is added to direct labor charged during the month to constructions and the total amount is multiplied by the General Expense Ratio (A). This result is divided by direct labor charged to construction which produces the credits to Ac. 677:

$$\text{Credits to Ac. 677} = \frac{(A) \times (\text{Direct Construction Labor} - (B) \times \text{Labor in Clearing Acs. cleared to Construction})}{\text{Direct Construction Labor}}$$

EXHIBIT G

Certificate of Charter Membership and Prior Service Credit in the Retirement System of Mutual Telephone Company Honolulu, Hawaii

This Is to Certify, That..... is a member of the Retirement System of Mutual Telephone Company and is registered as member number.....as of July 1, 1931, and is entitled to all the rights and privileges provided by the Rules and Regulations of the Retirement System, adopted by the Board of Directors of Mutual Telephone Company on April 16, 1931, or as they may hereafter be amended, and

That, the Board of Managers hereby certifies that the above-named member is entitled to a prior service credit of.....years, ...months, and..... days in full for all service rendered prior to the first day of July, Nineteen Hundred and Thirty-one.

In Testimony Whereof, the Board of Managers of the Retirement System of Mutual Telephone Company has caused this certificate to be issued.

Issuance of this certificate authorized at a meeting of the Board of Managers held on the..... day of....., 19....

.....,
Secretary.

Board of Managers
J. A. Balch, Ex-Officio Member;
F. G. Hummel, Chairman;
F. C. Atherton,
W. C. Avery,
R. H. Midcalf,
F. Marshall-Salsbury. [80]

EXHIBIT I

(Copy)

Before the Public Utilities Commission
of the Territory of Hawaii
Docket No. 988

In the Matter of

The Application of MUTUAL TELEPHONE COMPANY, for Approval of Revised Schedules of Rates and Charges.

DECISION No. 102

ORDER No. 598

"Extract from Pages 6 and 7 of Decision No. 102

"General and other operating expenses include a provision for 'Relief and Pensions,' Account 672. Under this classification there has been included a sum of $183,500 for 1948, and $183,900 for 1949. Company records show that approximately 1/3 of such costs $61,300.00 for 1949, for example, is to provide for the pension liability of past years under the company's pension plan. While for the purposes of this decision the full pension cost is allowed, there is a question as to whether present telephone subscribers should make up for past services.

"It is the view of the Commission that, when reasonably possible in the future, extra earnings should be employed to reduce this past service obligation.

"At the present time under Account 175, 'Contribution of Telephone Plant,' there appears an amount of $41,970.50[3]. It is the judgment of the Commission that this amount may well be trans-

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[3]The $41,970.50 represents payment made by telephone subscribers in the past principally for service connection charges. In Decision No. 57, and Order No. 406 dated July 16, 1942, the Mutual Telephone Company was ordered to maintain this amount in Account No. 175.2 until further directed."

ferred to the pension reserve to reduce the past service obligation and the order that follows will so provide."

Filed August 12, 1948, at 11:30 o'clock a.m.

/s/JEAN KENNY BRADFORD,
Secretary of the
Commission.

Before the Public Utilities Commission
of the Territory of Hawaii
Docket No. 988

In the Matter of

The Application of MUTUAL TELEPHONE COMPANY, for the Approval of Revised Schedules of Rates and Charges

ORDER No. 598

Pursuant to Commission's Decision No. 102 entered in the above-entitled matter this 7th day of August, 1948, it is hereby

Ordered: (1) That applicant, Mutual Telephone Company, is hereby authorized to file and publish the schedule of rates and charges set forth in Exhibit "A" attached hereto, and by reference made a part hereof, together with the conditions as set forth in Exhibit 20 which was filed by applicant in this proceeding, and to make said rates, charges and conditions effective on and after August 11, 1948, for service furnished on and after that date, except for rates and conditions applicable to intra-island message toll telephone service, which shall be made effective August 16, 1948.

(2) That applicant include the following conditions in each of its tariffs applicable to rural line service on Oahu, Hawaii, Maui and Kauai:

> "Rural Line Service is ten-party service, and not more than ten primary stations will be connected to a line, except upon authorization of the Public Utilities Commission of the Territory of Hawaii."

Applicant is hereby authorized to continue to serve more than ten primary stations per line, where such service arrangement is presently in effect, for a period of not more than one year from the effective date of this Order.

(3) That applicant file with this Commission, by September 1, 1948, a list of all lines having more than ten primary stations connected thereto, showing the number of primary stations on each line, and file monthly thereafter a statement showing the reductions made in primary stations on such lines. These statements may be discontinued at such times as the primary stations on each line do not exceed ten.

(4) That applicant transfer the amount of $41,970.50, presently carried in Account 175.2, "Contributions of Telephone Plant," to its pension reserve to reduce the accrued liability for past service.

(5) That applicant proceed with a separation study of its toll and exchange operations and of its intra-island, inter-island and other toll opera-

tions. Such study shall be made, in general, in accordance with the "Standard Procedures for Separating Telephone Property, Revenue and Expenses," prepared by the NARUC-FCC Special Cooperative Committee on Telephone Regulatory Procedure. Such study shall be made for the year 1949, and, unless otherwise authorized by this Commission, for succeeding years.

Done at Honolulu, City and County of Honolulu, Territory of Hawaii, this 7th day of August, 1948.

PUBLIC UTILITIES COMMISSION OF THE TERRITORY OF HAWAII,

By /s/ J. M. DOWDA,
Its Chairman;

By /s/ J. HAROLD HUGHES,
Commissioner;

By /s/ M. R. AGUIAR, JR.,
Commissioner;

By /s/ F. G. MANARY,
Commissioner;

By /s/ LEO G. LYCERGUS,
Commissioner.

Attest:

I, Jean Kenny Bradford, Executive Secretary of the Public Utilities Commission of the Territory of Hawaii, do hereby certify that the foregoing Order No. 598 is a full, true and complete copy of original on file in the office of the Commission.

/s/ JEAN KENNY BRADFORD,
Secretary.

EXHIBIT "A"

Basic Exchange Rates, P.B.X. Trunk Rates—Dial Exchanges

The following rates are authorized in dial exchanges:

Monthly Rate—Each Primary Station

Rate Group	Business Service 1-Party	2-Party	Rural*	Residence Service 1-Party	2-Party	4-Party	Rural*
A	$10.50	$8.50	$8.00	$4.75	$4.00	$3.50	$3.50
B	8.25	7.00	6.75	4.25	4.00	3.50	3.50
C	7.50	6.50	6.25	4.00	3.75	3.50	3.50
D	7.00	6.00	6.00	4.00	3.75	3.50	3.50

* Ten-party service.

Monthly Rate—Each P.B.X. Trunk

Rate Group	Two-Way	One-Way
A	$15.75	$14.75
B	12.25	11.25
C	11.25	10.25
D	10.50	9.50

Rate Group	Exchange or Serving Area
A	Honolulu
B	Hilo and Wailuku
C	Aiea S.A.,* Kailua S.A.,† Lihue, Pearl City,* and Wahiawa
D	Honomu, Kalaheo S.A.,‡ Kilauea, Kohala, Kula, Lahaina, Laupahoehoe, and Waimea (Kauai)

* Serving area of the Aiea-Pearl City-Waipahu exchange.

† Serving area of the Kailua-Kaneohe exchange.

‡ Serving area of the Eleele exchange.

Residence and Extension and Hotel P.B.X. Station Rates

The following rates are authorized in all exchanges on Oahu, Hawaii, Maui and Kauai:

	Rate Per Month
Each residence extension station	$1.25
Each hotel P.B.X. station rate	1.25

Exhibit "A"—(Continued)

P.B.X. Switchboard Rates

The following rates are authorized in all exchanges on Oahu, Hawaii, Maui and Kauai:

P.B.X. Switchboard	Rate Per Month Manual or Dial
Cordless	$ 7.00
50 Line-Cord	12.00
100 Line-Cord	15.00
200 Line-Cord	20.00
300 Line-Cord	25.00
Multiple, per position	25.00

Service Connection Charges

The following charges are authorized in all exchanges on Oahu, Hawaii, Maui and Kauai:

	Charge
1. Instruments not in place:	
Each business primary station	$7.00
Each private branch exchange trunk	7.00
Each residence primary station	5.00
Each extension station	2.50
Each P.B.X station	2.50
2. Instruments in place:	
No change in type or location	2.50
Supersedure	1.50

Move and Change Charges

The following charges are authorized in all exchanges on Oahu, Hawaii, Maui and Kauai:

1. Moves on same premises: Each station $2.50
2. Move from one premises to another premises. Service connection charge applicable at new location.
3. Change in type of instrument $2.50
4. Other changes ..... Actual cost

Exhibit "A"—(Continued)

Toll Service
Message Toll Telephone Service

All Intra-Island Toll Routes
Hawaii, Kauai, Maui, Oahu

Air-Line Mileage		Initial and Overtime Cents Per Message							
		Station-to-Station				Person-to-Person			
	Not	Weekdays		Night & Sun.		Weekdays		Night & Sun.	
More Than	More Than	1st 3 Min.	Over-time	1st 3 Min.	Over time	1st 3 Min.	Over-time	1st 3 Min.	Over-time
0	11	10c	5c(2)	10c	5c(2)	20c	5c(1)	20c	5c(1)
11	20	15c	5c(1)	15c	5c(1)	25c	5c(1)	25c	5c(1)
20	30	20c	5c(1)	15c	5c(1)	30c	10c(1)	25c	5c(1)
30	45	25c	5c(1)	20c	5c(1)	35c	10c(1)	30c	10c(1)
45	65	30c	10c(1)	25c	5c(1)	40c	10c(1)	35c	10c(1)
65	90	35c	10c(1)	30c	10c(1)	45c	15c(1)	40c	10c(1)

Note: Figures inside parentheses () indicate the number of minutes for which the overtime rates apply.

Airline mileages are to be in accordance with Exhibit 20, filed in Docket No. 988, entitled "Proposed Local Toll Tariffs," except no mileage shall be shown between the following points, and a notation shall be made that service between such points is exchange service.
Kaneohe-Kailua Waipahu-Aiea Waipahu-Pearl City Aiea-Pearl City

Private Line Service

The following rates are authorized for private line services on Oahu, Hawaii, Maui and Kauai:

Types of Circuit	Rate Per Month Per Quarter Mile or Fraction Thereof	
	Intraexchange	Interexchange
Regular Voice Circuits	$ .75	$1.25
Regular signal, control and teletypewriter circuits	.75	.75
High quality broadcasting, radiotelephone and other special leased line circuits	1.25	1.25

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys that the following statement of facts shall be considered as true and in evidence. This stipulation of facts is supplemental to the stipulation of facts in this case which was filed March 26, 1951.

I.

In 1949 Plaintiff paid the sum of $232,777.36 to the Retirement System of Mutual Telephone Company; and during this year in determining its taxable net income Plaintiff deducted the sum of $190,806.86 representing statutory deductions under the Internal Revenue laws on account of Plaintiff's obligation, if any, under the provisions of the Retirement System, a copy of which is attached to the stipulation, filed March 26, 1951, and marked Exhibit H. [37]

Dated Honolulu, Hawaii, this 5th day of June, 1951.

MUTUAL TELEPHONE
Plaintiff,

By /s/ MARSHALL M. GOODSILL,
Attorney for Plaintiff,

UNITED STATES
OF AMERICA,
Defendant,

By /s/ HOWARD K. HODDICK,
Acting United States Attorney, District of Hawaii,
Attorney for Defendant.

[Endorsed]: Filed June 5, 1951. [38]

In the United States District Court
for the District of Hawaii

Civil No. 931

MUTUAL TELEPHONE COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

DECISION

The question here presented is whether the Commissioner of Internal Revenue erred in his determination that the taxpayer, under Sections 22(a), 41, and 42 of the Internal Revenue Code, was required to include in its taxable income for the calendar years 1941 and 1942, the increased installation and "supersedure" charges that it received from its subscribers, following the authorization for such charges by the Public Utilities Commission of the Territory of Hawaii.

The pertinent sections of the Internal Revenue Code are copied in the margin.* [127]

1. Findings of Fact

The facts in this case have been stipulated, and are adopted by this Court as its Findings.

I.

The plaintiff is a corporation organized under the laws of the Kingdom of Hawaii and existing under the laws of the Territory of Hawaii. It is a public utility whose principal business consists in furnishing wire telephone service in the Islands. It is subject to the jurisdiction of the Public Utilities Commission of the Territory, hereinafter referred to as the Commission, under Chapter 82, Revised Laws of Hawaii, as amended. Its rates, fares, charges, records, accounting system, [128] financial

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"*Section 22. Gross Income

"(a) General Definition. 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
* * *

"Section 41. General Rule. The net income

transactions, etc., are subject to the regulation of the Commission.

II.

On September 10, 1941, the plaintiff filed a petition with the Commission, which was assigned Docket No. 764, in which the plaintiff requested the Commission to authorize certain increases in its installation tariffs and to authorize establishment of new "supersedure" tariffs for the purpose of diminishing the demand for new telephone service in Honolulu.

Installation, or connection, charges are of two types—service connection charges and reconnection charges. A service connection charge is one customarily made by the plaintiff for connecting each telephone instrument newly placed into a subscriber's premises. A reconnection charge is one ordinarily made by the plaintiff for reconnecting a dead instrument already in place. A supersedure charge is one, not theretofore made by the plaintiff, for

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shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer. * * *

"Section 42. Period in which items of gross income included:

"(a) General rule. The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under Section 41, any such amounts are to be properly accounted for as of a different period. * * *"

substituting a new subscriber for a prior subscriber at the same premises, where the telephone instrument is not dead and is not reconnected.

III.

After a hearing on the above petition, the Commission filed its Decision No. 51 and its Order No. 379. In the Decision the Commission approved the plaintiff's request, and in its Order it made the requested increases in the installation and the supersedure tariffs.

In the Decision, the Commission found that while the plaintiff did not contend that additional income was [129] required, it did maintain that the additional charges were required for the retarding effect; that the plaintiff had made no showing that an increase in revenue was required and that the Commission believed that it was improper to allow the increase to go through in a manner which would permit it to be passed on to the common stockholders in the form of increased dividends; that the increase would be credited to Account No. 175, Contributions to Telephone Plant, and in computing rates would be a reduction from the net investment in arriving at a rate base, and that investors would not require a return and subscribers would be spared paying a capital charge on it; that on motion of the Commission or other application of the plaintiff, other disposition of the accrued balance might be made as conditions warranted; and that in the opinion of the Commission the increased charges should be but temporary.

In Order No. 379 the Commission directed that the increased installation and the new supersedure charges should be charged to Account No. 175, Contributions to Telephone Plant, and the amounts so accruing should be segregated from the other charges in said account.

IV.

The increased installation and the supersedure charges were put into effect by the plaintiff as of October 2, 1941. On April 22, 1942, the plaintiff filed with the Commission a petition in which it requested [130] a termination of the additional charges. The Signal Corps of the United States Army had established a system of priorities for telephone allocations and consequently the plaintiff considered the additional charges no longer necessary.

V.

Pursuant to the filing of the aforesaid petition, the Commission, by Decision No. 57 and Order No. 406, filed on July 18, 1942, terminated the increased and newly-established charges as of May 1, 1942. In its decision and order, the Commission directed that the additional charges collected by the plaintiff under the earlier decision and order were to be held in Account No. 175 until the Commission should determine their final disposition.

VI.

For many years the plaintiff has kept its accounts in accordance with the Uniform System of Accounts for Class A Telephone Companies issued by

the Federal Communications Commission, which system was prescribed for the plaintiff by an earlier order of the Commission.

Account No. 175, "Contributions of Telephone Plant," is one of the accounts provided for in the said Uniform System. In accordance with that System, the plaintiff credited to Account 175 contributions by its subscribers for line extensions. Such contributions by its subscribers have never been reported by the plaintiff as income for Federal income tax purposes, and have never been taxed [131] as income.

In 1945, the Federal Communications Commission amended the said Uniform System of Accounts by eliminating Account No. 175 and instructing that the amounts held in such account be deducted from the appropriate plant asset accounts. The plaintiff in 1945, complied with these instructions with respect to the amounts in Account No. 175 that represented contributions for line extensions. Subaccount 175.2, however, referred to below, was retained intact because of the said Order No. 406 of the Commission, terminating the increased and newly-established charges and directing that those which had been theretofore collected be held in Account No. 175.

The increased installation and the new supersedure charges were collected by the plaintiff from subscribers from October 2, 1941, to May 1, 1942. Pursuant to the said Order No. 379 of the Commission, the plaintiff credited amounts equal to its collections of the increased installation and new

supersedure charges to a new Subaccount No. 175.2, entitled "Liability for Installation Charges." This new subaccount was started by the plaintiff and maintained as a subaccount under the general Account No. 175, "Contributions of Telephone Plant" in order that the amounts in Subaccount 175.2 could be segregated from the other amounts credited to Account No. 175 in accordance with the Commission's order.

The defendant does not concede that the [132] sums received by the plaintiff from subscribers on account of the increased installation and the new supersedure charges which were credited to Subaccount 175.2 were or are liabilities of the plaintiff.

The plaintiff received $13,341.50 and $28,673 in 1941 and 1942, respectively, on account of the increased and the newly-established installation and supersedure charges. This total of $42,014.40 was adjusted to $41,970.50 in February, 1944, to correct an accounting error of $44 that was detected in reconciling the accounts.

VII.

Subaccount No. 175.2 was credited with all the increased installation and new supersedure charges collected by the plaintiff under Decision No. 51 and Order No. 379, supra. These additional charges were not billed to the customer as such. The subscriber was charged in one sum for the total of his installation or supersedure charge. It was recorded on the bill as "Other Charges" and was explained by a supplemental statement sent out with the bill.

This statement was entitled "Statement of Other Charges and Credits" and has several items listed on it. One of these items was "Service Connection Charge" and the installation or supersedure charge in one amount was recorded opposite this item.

Although the billings to subscribers did not show the amount of the increased installation charges separately from previously existing installation charges and did not show the newly-established supersedure charges separately, the plaintiff maintained its [133] accounting records, as it was required to do by the order of the Commission, so as to reflect the amount of the increased installation charges separately from the previously existing installation charges, and so as to reflect the newly-established supersedure charges separately from previously existing charges. The additional charges were all credited to Subaccount 175.2, "Liability for Installation Charges," and the plaintiff maintained a record of the amount of the additional installation or supersedure charge paid by each customer so that the exact amounts of such payments could have been refunded to the individual customers if this were ever required.

The total cost to the plaintiff of making new service connections exceeded the revenue from the tariffs charged therefor—even including the additional new connection charges authorized by Order No. 379, supra. The cost of materials, including telephone instruments, switches, wiring and cables, and the cost of field labor required to make the installation, were in the case of each new service

connection capitalized by setting up such costs in the plaintiff's plant asset account. These costs remain in the plant asset account until the instrument is removed and at the time of removal are charged to operations. Administration and office expenses in the case of new service connections were charged off as expenses of operations in the year in which they were incurred. The total estimated cost of each new service connection was $13.92 [134] during this period. The cost of materials and field labor, which was capitalized as aforesaid, was approximately 85 per cent of such total cost, and the cost of administration and office expenses, which was expensed as aforesaid, was approximately 15 per cent of such total cost.

The revenue from the tariffs charged for reconnections and supersedures under the Commission's Order No. 379 exceeded the total cost to the plaintiff of making such reconnections and supersedures. Such costs were entirely charged off as expense of operations in the year incurred.

Of the additional revenue (see Paragraph VI) received by the plaintiff on account of the increased charges, approximately 60.55 per cent was received on account of the additional service connection charges, 21.35 per cent on account of the additional reconnection charges, and 18.10 per cent on account of the new supersedure charges.

With the exception of billing and the accounting necessary to keep the additional charges segregated from other charges, the plaintiff was not required to do, and did not do, any additional work or perform any additional service in order to receive the

increased installation charges and the new supersedure charges; that is, it did exactly the same work for subscribers in making connections and supersedures as it had done before the new charges were established and as it did after they [135] were terminated.

Although Sub-account 175.2 was credited with the additional charges as they were collected and the plaintiff's general cash account was debited, the moneys collected by virtue of the additional charges were intermingled with other moneys in the general treasury of the plaintiff, and were used by the plaintiff without regard to their source. The plaintiff at all times material herein had on hand cash or marketable securities in excess of the amounts collected from subscribers for the increased installation charges and the new supersedure charges.

VIII.

The plaintiff maintains its records on the accrual basis, and files its tax returns on the accrual basis for the calendar year. The plaintiff did not report the aforesaid increased and newly established installation and supersedure charges received in 1941 and 1942 as part of its gross income in its tax returns for 1941 and 1942.

IX.

The plaintiff filed in due time its income tax, declared value excess profits tax, and excess profits tax returns for the calendar years 1941 and 1942 with the Collector of Internal Revenue of the United States for the District of Hawaii. The Re-

port of Examination by the Internal Revenue Agent in charge, dated November 2, 1943, proposed deficiency assessments of taxes for those years on the grounds of failure to include as gross income the increased installation charges and the new [136] supersedure charges hereinabove described. A protest of the proposed deficiency assessments on these grounds was filed with the Agent in Charge under date of July 28, 1944. The protest was denied by the Commissioner of Internal Revenue and a notice of determination of deficiency dated January 8, 1945, was received by the plaintiff. The deficiencies determined by the Commissioner on account of failure to include the said charges in gross income were:

1941	Income Tax Liability		$ 1,978.47
	Excess Profits Tax Liability		6,959.35
1942	Declared Value Excess Profits Tax Liability		1,892.43
	Excess Profits Tax	$24,102.51	
	Less: 10% post war credit	2,410.25	21,692.26
Interest			4,205.88
	Total		$36,728.39

These additional taxes and interest, in the total amount of $36,728.39 for both years, were assessed. They were paid by the plaintiff on February 2, 1945, to Fred H. Kanne, at that time Collector of Internal Revenue for the District of Hawaii. Mr. Kanne is now dead. The payment of these taxes and interest was not charged to Account No. 175.2.

The plaintiff filed claims for refund on December 6, 1946, for each of the calendar years 1941 and

1942 with the Collector of Internal Revenue for the District of Hawaii. The claim for refund for 1941 was for $10,482.57, plus interest; and the claim for 1942 was for $27,951.66, [137] plus interest. The Report of Examination of the Internal Revenue Agent in Charge, dated October 16, 1947, proposed that the claims be disallowed. On June 1, 1948, the plaintiff received a notice of disallowance, dated May 19, 1948, covering both claims for refund, in full, from the Commissioner of Internal Revenue.

X.

During 1948, the Commission, following an application by the plaintiff for an increase in rates, held a hearing on the plaintiff's rates and charges.

In 1931, the plaintiff's board of directors established a jointly contributory retirement system, known as the "Retirement System of Mutual Telephone Company," to be operated under a board of managers consisting of the president of the plaintiff and four other persons appointed by the board of directors. The Retirement System is a separate entity from the plaintiff, and maintains its own books and accounts. The plaintiff does not have in its own accounts a "pension reserve," as such, and has reserved the right to discontinue or to reduce at any time its contributions to the Retirement System. An employee who took the necessary steps provided for in the Rules and Regulations of the System was credited with years of service put in prior to the establishment of the System, and was issued a certificate stating that he was entitled to

all the rights and privileges provided for by the Rules and Regulations, and that he was entitled to a specified prior service credit in full for all service rendered prior to July 1, 1931. [138]

Although the plaintiff did not suggest to the Commission at the time of the 1948 hearing that any action be taken regarding Subaccount 175.2, the Commission on its own initiative, in its Decision No. 102, considered the cost to the plaintiff of the Retirement System, and in Order No. 598 directed that the plaintiff "transfer the amount of $41,970.50 presently carried in Account 175.2, 'Contribution of Telephone Plant,' to its pension reserve to reduce the accrued liability for past service."

On December 3, 1948, the plaintiff addressed a letter to the Commission outlining the tax difficulties that had arisen in connection with the additional charges which had been credited to Subaccount 175.2. In that letter, the plaintiff requested that the Commission suspend paragraph 4 of Order No. 598, providing for the transfer of the funds from Subaccount 175.2 to the plaintiff's "pension reserve" until a final determination of the amount transferable. On December 22, 1948, the Commission replied that this matter should be held in abeyance by the plaintiff pending formal approval by the Commission. On February 24, 1949, the Commission advised the plaintiff that it had denied the latter's request to suspend the transfer. On March 1, 1949, the plaintiff deposited $41,970.50 in cash to the account of the Retirement System, in the Bank of Hawaii, and deleted Subaccount 175.2.

On March 8, 1949, the plaintiff advised the Commission of this action.

In 1949 the plaintiff paid the sum of [139] $232,777.36 to the plaintiff's Retirement System; and in the same year, in determining its taxable net income, the plaintiff deducted the sum of $190,806.86, representing statutory deductions under the Internal Revenue laws, on account of the plaintiff's obligation, if any, under the provisions of the Retirement System.

2. Opinion

The Sums Received by the Plaintiff as Increased Connection and "Supersedure" Charges Constituted Gross Income.

The first point urged by the plaintiff is that the sums received by it as increased connection and "supersedure" charges are not includable in the plaintiff's gross income for 1941 and 1942, or in any other year, because they do not constitute "income" within the meaning of the Sixteenth Amendment.

Not only does the language of the Amendment itself and of the Internal Revenue Code refute this contention, but also do the holdings of the Supreme Court negative its validity.

In North American Oil Consolidated v. Burnet, 286 U.S. 417, 424 (1932), Mr. Justice Brandeis said:

"If a taxpayer receives earnings under a claim of right and without restrictions as to its disposition, he has received income which he is required

to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent."

This "claim of right" doctrine has been consistently followed by the Supreme Court, even down to a few months [140] ago. See Commissioner v. Wilcox, 327 U.S. 404, 408 (1946), affirming 9 Cir., 148 F. 2d 933 (1945); United States v. Lewis, 340 U.S. 590, 592 (1951).

See also Commissioner v. Brooklyn Union Gas Co., 2 Cir., 62 F. 2d 505, 506 (1933); Gilken Corporation v. Commissioner, 6 Cir., 176 F. 2d 141, 145 (1949).

So here, the plaintiff received the additional charges in question under a claim of right. The mere fact that it might later have to disgorge them did not militate against such revenues being "income" when they were received. It would be unconscionable to permit the plaintiff to retain these gains, admittedly unjustified as mere revenue—and, as we have seen, it is permitted to retain them—and yet pay no income tax upon them.

Nor can we in this case be concerned with the niceties of accountancy technique. We are here interested in realities, and not in the jargon of bookkeeping.

In Weiss v. Wiener, 279 U.S. 333, 335 (1929), Mr. Justice Holmes said:

"The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or a business man would take

into account in determining the pecuniary condition of the taxpayer."

See also Helvering v. Midland Ins. Co., 300 U.S. 216, 225 (1937); Commissioner v. Union Pacific R. Co., 2 Cir., 86 F. 2d 637, 639 (1936); Board v. Commissioner, 6 Cir., 51 F. 2d 73, 75 (1931), certiorari denied, 284 U.S. 658.

As its second contention, the plaintiff insists that the sums received by it as increased connection and [141] supersedure charges are not includable in its gross income for 1941 and 1942 even though they constitute "income" in a subsequent year.

In this connection, if one bears in mind the facts in the instant case, the following language in the case of Board v. Commissioner, supra, 51 F. 2d at pages 75-76, cited with approval by the Supreme Court in North American Oil v. Burnet, supra, is pertinent:

"We are of the opinion that the board was right in allocating this income to the year 1920. That it was actually received during that year is not disputed; nor is it disputed that it was received under a claim of right and as profits to which the petitioner was justly entitled. The only claim made is that the contract whereby petitioner purported to secure his interest in the pipeline was illegal and unenforceable by reason of his position as a director of the Old Dominion Oil Company. In this contention the petitioner of course never acquiesced. The payment was never refunded. Possibly it might have been recovered in the litigation which was instituted for that purpose, but it was not, and

it is at least unusual that a taxpayer should be heard to assert the possibility of an adjudication of alleged misconduct and breach of trust, as relieving him from tax liability which is predicated upon the assumption of the honesty and legality of his acts. Obviously, the sum involved must be considered as income either for the year 1920 or 1927, and we think that it must be allocated to the year 1920, in which it was actually received, rather than to the year 1927, in which the taxpayer's right to retain it was established." (Emphasis supplied.)

See also Penn v. Robertson, 4 Cir., 115 F. 2d 167, 175 (1940.)

3. Conclusion of Law

The increased installation and supersedure charges received by the plaintiff from its subscribers in the [142] calendar years 1941 and 1942 constituted income ascribable to and taxable in those years.

Let judgment be entered for the defendant.

Dated September 28, 1951.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

[Endorsed]: Filed September 28, 1951. [143]

In the United States District Court
for the District of Hawaii

Civil No. 931

MUTUAL TELEPHONE COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above cause having been submitted to this Court on the following: a Stipulation of Facts filed March 26, 1951; a Supplemental Stipulation of Facts filed June 5, 1951; a brief for the plaintiff filed April 16, 1951, by its counsel, Heaton L. Wrenn and Marshall M. Goodsill of the law firm of Anderson, Wrenn & Jenks of Honolulu; a brief for the defendant filed June 5. 1951, by its counsel, Theron Lamar Caudle, Assistant Attorney General; Andrew D. Sharpe and Ruppert Bingham, Special Assistants to the Attorney General, and Howard K. Hoddick, Acting United States Attorney; a supplementary brief for the defendant filed June 5, 1951, prepared by Edward A. Tonjes of the Internal Revenue Bureau; and a reply brief for the plaintiff filed by its counsel on June 19, 1951; and counsel for the plaintiff and the defendant having agreed that the cause would be submitted to the Court on the aforesaid Stipulations of Facts and briefs and that there would be no oral argument,

and the Court being fully advised in the premises and having heretofore filed on September 28, 1951, a decision in this matter which contains findings of fact and conclusions of law, [145]

In accordance with that decision, judgment is herewith entered for the defendant and against the plaintiff, and

It Is Hereby Ordered and Adjudged that the complaint filed herein be and is dismissed, with prejudice. Costs are awarded to the Defendant.

Dated at Honolulu, T. H., this 4th day of December, 1951.

/s/ J. FRANK McLAUGHLIN,
Judge, United States District Court.

Approved as to form:

HEATON L. WRENN,

MARSHALL M. GOODSILL,
Attorneys for Plaintiff.

By /s/ MARSHALL M. GOODSILL.

[Endorsed]: Filed December 4, 1951. Entered December 4, 1951. [146]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Mutual Telephone Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment of dismissal entered in this action on December 4, 1951.

/s/ MARSHALL M. GOODSILL,
Attorney for Appellant,
Mutual Telephone
Company.

[Endorsed]: Filed January 31, 1952. [148]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the record on appeal in the above-entitled cause, numbered from page 1 to page 166 consists of a statement of the names and addresses of the attorneys of record and of the various pleadings, exhibits as hereinbelow listed, that all of said pleadings and exhibits consist of original papers filed in my office and are accompanied by this

certificate, and that the pages of the certified record at which said pleadings and exhibits occur are as hereinbelow indicated:

Pages

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 5th day of March, A.D. 1952.

/s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of Hawaii.

[Endorsed]: No. 13284. United States Court of Appeals for the Ninth Circuit. Mutual Telephone Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed March 6, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

The United States Court of Appeals
for the Ninth Circuit

No. 13284

MUTUAL TELEPHONE COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS TO BE RELIED UPON

Comes now Mutual Telephone Company, the appellant in this action, and states that the points upon which it intends to rely in this court in this action are as follows:

1. The United States District Court for the District of Hawaii erred in making and entering its decision dated September 28, 1951, in this action.

2. The United States District Court for the District of Hawaii erred in rendering and entering its judgment of dismissal dated December 4, 1951, in this action.

3. The United States District Court for the District of Hawaii erred in finding that the increased installation and supersedure charges received by appellant from its subscribers in the calendar years 1941 and 1942 constituted income ascribable to and taxable in those years.

4. The increased installation and supersedure charges were not income to appellant in 1941 and 1942 because they were received and held in those years subject to a restriction and were not subject to appellant's "unfettered command," and the United States District Court for the District of Hawaii erred in not so finding and deciding.

5. The increased installation and supersedure charges received by appellant in 1941 and 1942 did not constitute "income" within the meaning of the Sixteenth Amendment, and the United States District Court for the District of Hawaii erred in not so finding and deciding.

Dated Honolulu, T. H., February 21, 1952.

MUTUAL TELEPHONE COMPANY,

By /s/ MARSHALL M. GOODSILL,
Attorney for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed March 6, 1952.